(b)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 433

CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,885)

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In the United States Circuit Court of Appeals

FIFTH CIRCUIT.

No. .....

THE CITY OF GAINESVILLE, PLAINTIFF IN ERROR,

VS.

SOUTHERN CONSTRUCTION CO., ET AL., DEFENDANTS IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Caption.

Be it remembered, that at a regular term of the United States District Court for the Eastern District of Texas, and the fifth circuit, begun and held in the court room of said court, in the City of Sherman, Texas, and in said district, on Monday, the 17th day of May, A. D. 1926, and which term adjourned on Saturday, the 22nd day of May, A. D. 1926, the Honorable W. L. Estes, United States District Judge for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial, and was tried, to-wit:

Style of cause:

The City of Gainesville,

vs.

Southern Construction Co., et al.

Plaintiff's Third Amended Original Petition.

In the District Court of the United States, for the Eastern District of Texas. At Sherman, Texas.

The City of Gainesville,

vs.

Southern Construction Co., et al.

Comes now the City of Gainesville, plaintiff, in the above styled and numbered cause, and by leave of the court first had and obtained, filed this its third amended original petition and for such petition says.

The City of Gainesville, plaintiff complaining of the Southern Construction Company and Harry D. Levy and Lester Levy, doing business under the style and name of the Southern Construction Company and Lester Levy and Harry D. Levy individually, and H. O. Head executor of the estate of H. W. Head, deceased, and the Southern Surety Company, a corporation, and the Brown-Crummer Investment Company, a corporation, defendants, and for cause of action says:

1.

That the plaintiff is a municipal corporation situated in Cooke County, Texas, duly chartered by a special act of the legislature of the State of Texas and approved March 17, 1909, and soon thereafter adopted by the voters of the City of Gainesville, the duly elected, qualified and acting mayor of which is a partnership composed of Harry D. Levy and Lester Levy, whose residence is to the plaintiff unknown and that said Harry D. Levy and Lester Levy were at all times

hereinafter mentioned in business under the style and name of the Southern Construction Company, and that the defendant, the Southern Surety Company is a corporation duly incorporated under the laws of the State of Iowa, but having a permit to do business in the State of Texas and having a local agent representing it, to-wit, John T. Suggs, who resides in the City of Denison in Grayson County, Texas, and on whom service of citation may be had, and that H. O. Head is duly qualified and acting executor of the estate of H. W. Head, deceased, and that said H. O. Head resides in Grayson County, Texas, and that the defendant, the Brown Crummer Investment Company is a corporation duly incorporated under the laws of the State of Kansas but having a permit to do business in Texas and that its agent for service in Texas is C. J. Moore who resides in the City of Dallas in Dallas County, Texas, and on who service of citation may be had.

2.

That the defendant Lester Levy and Harry D. Levy having had citation heretofore served upon each of them herein and that the said Harry D. Levy and Lester Levy have at all times hereinafter mentioned done business under the style and name of Southern Construction Company and that the Southern Surety Company, a corporation, has waived service herein and also answered herein, and that H. W. Head waived service herein and also answered herein, but that the said H. W. Head is dead, having died in the latter part of the year 1921 or the early part of the year 1922,

and that the defendant H. O. Head is now the duly qualified and acting executor of the estate of the said H. W. Head, deceased, and is made a party defendant herein as such, and that the defendant Southern Construction Company has heretofore been served with citation herein and has answered herein.

3.

That heretofore, to-wit, on the 20th day of November, 1919, the plaintiff entered into the contract with the defendant, the Southern Construction Company, under which style and name the defendants, Lester Levy and Harry D. Levy were at all times mentioned doing business, whereby and whereunder the said defendant undertook to do and perform certain street work and paving on certain streets of the city for the plaintiff according to and as shown by said contract and the plans and specification for said paving work and that on the said 20th day of November, 1919, the plaintiff entered into and made with the said construction company a supplemental contract and that on the 16th day of December, 1919, the said council of the plaintiff city by an ordinance duly enacted, passed and adopted by said city council ratified and confirmed the said contract and said supplemental contract and said plans and specification which were fully set forth in the said ordinance adopted by said council on the said 16th day of December, 1919, the said ordinance containing and setting forth the contract and said supplemental contract and said plans and specification being attached and the same being made a part hereof

as though fully set out herein and being marked Exhibit "A."

That the original contract above referred to of date November 20, 1919, provided among other things for the execution of a bond to the City of Gainesville by the defendant the construction company and that said contract set forth that said bond had been executed and had been annexed to said contract but that in truth and in fact no such bond was executed to said city by said construction company, but that instead on said date a supplemental contract was entered into by the plaintiff city and said construction company by which the original contract as to the provisions for the bond was modified and it was provided in said supplemental contract that the said city should issue its warrants in the sum of $50,000.00—in denominations of $1000.00 each and to be designated "City of Gainesville street improvement warrants series" to be dated November 20, 1919, bearing interest at the rate of six per cent per annum said interest payable semi-annually on said dates as should be found advisable by the plaintiff said warrants maturing serially in approximately one to twenty years, said warrants to be issued in payment for labor materials, supervision and so forth furnished by the said construction company in said paving work in consideration of which the said construction company agreed to accept the said warrants in payment for labor, materials and supervisions in doing said paving work on said streets, all of which is fully set forth in said ordinance adopted by the said city

council on the said day of December 16, 1919, and all of which ordinance is hereby expressly made a part of this petition as an exhibit thereto as though fully set forth in the face and body of this petition.

And this plaintiff would further show to the court that it did so issue said warrants in the sum of $50,000.00, in denominations of $1000.00 each numbered from one to fifty due and payable in from one to .... years.

Copy of said warrants being as follows;

United States of America, Number 2, $1000.00.

State of Texas, County of Cooke.

City of Gainesville

Street Improvement Warrant
Series A I.

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the first day of March, 1921, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas.

One Thousand Dollars.

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the first day of March, 192.. and semi-annually thereafter on September 1st and March 1st of each year and the

City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto, principal and interest payable at the place above named upon presentation and surrender of warrant or proper coupon.

This Warrant is one of a series of Fifty (50) warrants, numbered consecutively from One (1) to Fifty (50) inclusive, in the denomination of One Thousand Dollars ($1000.00) each aggregating the sum of Fifty Thousand Dollars ($50,000.00), issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to The Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 16th day of December, 1919, recorded in Book 6, at pages 583, *et seq.* of the Minutes of said City Council.

The date of this warrant, in conformity with the ordinance above mentioned, is November 20th, 1919.

And It Is Hereby Certified and Recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and

due time, form and manner as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof, the City of Gainesville has caused this corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor and countersigned by its City Secretary, and registered by the City Treasurer as of the date last above written.

E. N. Blackburn
Mayor, City of Gainesville, Texas.

Countersigned;
S. A. Bryan
City Secretary, City of Gainesville, Texas.

Registered this the 27th day of April, 1920.

R. R. Hulett
City Treasurer, City of Gainesville.

Said warrant further contained the following coupon provisions set forth on the face thereof and that said warrants had on the back of each of them the following assignment and other matter. The said coupon is as follows;

"Number 3, $30.00

On the first day of March 1921.

The City Treasurer of the City of Gainesville, Texas, will pay to the Southern Construction Company, their assigns or bearer, at the offices of The Brown-Crummer Investment Company, Wichita, Kansas, the

sum of Thirty and no-100 Dollars ($30.00), the same being six months' interest due that day on City of Gainesville, Texas, Street improvement Warrant, Series A One, dated November 20th, 1919, and is a part thereof" No. 2.

E. N. Blackburn, Mayor.

S. A. Bryan, City Secretary.

The said assignment appearing on the back of each warrant is as follows;

This Is To Certify that we have received the within principal Paving Warrant, and the interest coupons thereto annexed from the City of Gainesville, Texas, and for value received, we hereby transfer, assign, sell and deliver without recourse, to bearer, all right, title and interest we have in and to the same, and also the proportionate part of said contract price, and the debt due us, with interest thereon, by said City, which is represented by the amount called for by this principal warrant, and the annexed coupons; and the said bearer is hereby subrogated to all claims, liens, right or title, whether in law or in equity, which are or may be secured to us in said contract, and we hereby authorize the bearer hereof to collect the same and give full receipt and acquittance thereof in our name.

The Southern Construction Company,
a partnership,
By Lester Levy
Member of the firm.

Said warrant had on its back the following in addition to the assignment above copied.

United States of America, Number 2, State of Texas County of Cooke City of Gainesville Street Improvement Warrant Series A I. 1000, Per 6 Cent, Dated November 20, 1919. Principal Due, March 1, 1921, Interest Payable September 1 and March 1 payable at the Office of the Brown-Crummer Investment Company, Wichita, Kansas.

The assignment in words and figures as above set forth contained the signed assignment and endorsement of the said construction company. The above copy is an exact copy of warrant number two issued by the plaintiff city under the terms and provisions of the ordinance above referred to, to the Southern Construction Company and under the terms and provisions of the contract and supplemental contract herein above referred to and the specifications and plans under which said paving work was to be done as set forth and incorporated in the ordinance herein above referred to, the warrant which is herein above copied having matured and having been paid to the Brown-Crummer Investment Company by the plaintiff city, both principal and interest, and this plaintiff says that said warrants issued by said city under said ordinance and contracts, is an exact copy of all such warrants, except as to serial number and date of maturity.

4.

That as is shown by the copy of said warrants herein above set forth the plaintiff city, for value received, promised to pay to the Southern Construction

Company, contractor, under said ordinance, contract and supplemental contract plans and specifiations, their assignees or bearer the amount of each of said warrants upon the maturity thereof, with interest at the rate of six per cent per annum payable semi-annually on the first day of March and the first day of September of each year at the offices of the Brown Crummer Investment Company of Wichita, Kansas, defendant herein.

5.

That the defendant Lester Levy and Harry D. Levy doing business under the style and name of the Southern Construction Company, a copartnership composed of said Lester Levy and Harry D. Levy, promised, agreed and undertook to do said paving work according to the plans and specifications as set forth in the ordinance above referred to and by which the plaintiff city ratified and confirmed said contract, to the amount of $50,000.00 and that at some time after passage and adoption of said ordinance and prior to the 20th day of September 1920, the said construction coentered and upon said work and said city paid said construction company $3000.00 in said warrants for paving work done under said contract and that about the said 20th day of September 1920 the said city delivered $10,000.00 of the warrants herein above referred to, to the said construction company, before the work represented by the said warrants had actually been done by the said construction company and that the said H. W. Head, in

order to aid the said construction company in acquiring possession of said $10,000.00 worth of warrants and to aid it in proceeding with said work entered into the following written obligation to the plaintiff city, whereby he undertook to indemnify the plaintiff city in the delivery of said warrants to said construction company and before said work had in fact been done, the said obligation being in words and figures as follows:

Sherman, Texas, September 10th, 1920.

To the City Council,
Gainesville, Texas.

Gentlemen:

By virtue of an order from the Southern Construction Company any monies due said Southern Const. Co., from the City of Gainesville for work done and materials furnished under a contract for street improvements is to be paid to me, said amounts being payable in City Warrants.

I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Const. Co., ten thousand dollars in warrants, these warrants to be properly endorsed by Southern Cons. Co., and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Cons. Co. so as to in any way affect said ten thousand dollars in warrants I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of ten thousand dollars.

None of said money will be paid or credited to Southern Cons. Co. except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. Head.

And this plaintiff would further show to the court that in order to indemnify the plaintiff city and protect it against loss on account of the delivery of said warrants to the said construction company and protect said city against any default on the part of H. W. Head in his undertaking as set forth in the obligation and herein above set out, the defendant Southern Surety Company entered into the following obligation of dated September 20, 1920, the said obligation of Head being attached to and made a part of said obligation of the said Southern Surety Company, which is as follows:

State of Texas, County of Grayson.

Know all men by these presents: That the Southern Surety Company of Des Moines, Iowa, is held and firmly bound unto the City of Gainesville, Texas, in the sum of fifteen thousand ($15,000.00) dollars, for the payment of which sum said Southern Surety Company hereby binds itself, its successors and assigns.

The condition of the foregoing obligation is such that whereas on the 10th day of September A. D. 1920, H. W. Head of Grayson County, Texas, agreed with the City of Gainesville, Texas, to protect said city of Gainesville, Texas in event of any dispute, discrepancy or other contingency which might arise in the delivering of certain warrants to said H. W. Head, original of said agreement being attached hereto and made a part of this bond.

Now, therefore, if said H. W. Head shall protect and indemnify said City of Gainesville as per terms of said agreement, then this obligation will become null and void; otherwise to remain in full force and effect.

Signed, sealed, and delivered this 20th, day of September, A. D. 1920.

Southern Surety Company,
By Sam Kirkpatrick,
Attorney in Fact.

This plaintiff would further show to the court that at some time about the 4th day of October, 1920, the plaintiff city issued and delivered, or obligated itself to deliver to said construction company the balance of said warrants, being $37,000.00, in amount in the denomination of $1000.00 each in payment for the balance of said street paving work to the amount of $50,000.00, which the said construction company as herein above said had agreed to do and perform it, the construction company having prior thereto received in payment for said work the sum of $13,000.00, $3,000.00

of which were paid in warrants and $10,000.00 of which was paid in warrants as above said, and that to indemnify the plaintiff city against loss on account of the delivery to the said construction company by the plaintiff city of said $37,000.00 in its warrants the said H. W. Head entered into the following obligation of date October 4, 1920.

Sherman, Texas, October, 4, 1920.

To the City Council
Gainesville, Texas,

Gentlemen:

By virtue of an order from the Southern Construction Company, any monies due said Southern Construction Company from the City of Gainesville, Texas for work done and materials furnished under a contract for street improvements to be paid to me, said amounts being paid in City Warrants.

I understand that it is now the purpose and intent of the City Council of the City of Gainesville, Texas, to have issued to said Southern Construction Company Thirty Seven Thousand ($37,000.00) dollars in warrants, these warrants to be properly indorsed by the said Southern Construction Company and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Construction Company, so as to in any way affect said thirty seven thousand dollars in warrants,

I hereby agree to protect and indemnify said City of Gainesville, Texas, against loss of any character whatsoever, up to the sum of fifty thousand ($50,000.00) dollars.

None of the said monies will be paid to or credited to said Southern Construction Company, except in such amounts as may be shown to be due by estimates duly allowed and signed by the Mayor of Gainesville, Texas and when such amounts shall equal thirty seven thousand ($37,000.00) dollars, then this obligation will be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured here by, such suit shall be filed in Cooke County, Texas.

H. W. Head.

This plaintiff would further show to the court that the Southern Surety Company, defendant, in order to indemnify the plaintiff city against loss on account of the failure of said H. W. Head to perform his agreements herein last above set out entered into the following obligation with the plaintiff city the said last mentioned obligation of said Head being referred to and made a part of the obligation of said surety company which is as follows:

State of Texas, County of Grayson.

Know all men by these presents: That the Southern Surety Company of Des Moines, Iowa, is held and firmly bound unto the City of Gainesville,

Texas, in the sum of fifty thousand ($50,000.00) dollars, for the payment of which sum said Southern Surety Company hereby binds itself, its successors and assigns.

The condition of the foregoing obligation is such that whereas on the 10th day of September, A. D. 1920, H. W. Head of Grayson County, Texas, agreed with the City of Gainesville, Texas, to protect said City of Gainesville, Texas in event any dispute, discrepancy or other contingency which might arise in the delivering of certain warrants to said W. H. Head, original of said agreement being attached hereto and made a part of this bond.

Now, therefore, if said H. W. Head shall protect and indemnify said City of Gainesville on per terms of said agreement, then this obligation will become null and void; otherwise to remain in full force and effect.

Signed, sealed, and delivered this the 20th day of September, A. D. 1920.

Southern Surety Co.,
By John T. Suggs,
Attorney in Fact.

This plaintiff would further show to the court that each and all of the above mentioned warrants were issued by the City of Gainesville under warrant and authority of law and that each and all of said warrants constituted the valid, legal and binding promise and obligation of the plaintiff to pay the full amount of each and all of said warrants both principal

and interest to the Southern Construction Company, or the assignee of the said construction company or any bearer of said warrants, or either of them, and the plaintiff further says that it did issue said warrants to the sum of $47,000.00 payable to the Southern Construction Company their assignees or bearer and that upon execution of the obligation of the said H. W. Head each and all of said warrants were assigned by the said Southern Construction Company, a partnership, by Lester Levy and member of said firm and that said warrants were delivered to the said H. W. Head who in turn sold and delivered each and all of such warrants to the Brown-Crummer Investment Company, defendant and that said Brown Crummer Investment Company, is now the owner and holder of said warrants except 6 of said warrants which have matured and have been paid, both principal and interest to the said Brown-Crummer Investment Company.

7.

This plaintiff would further show to the court that each and all of said warrants are of cash value of the amount of the face thereof, including the matured interest thereon and were at all times of said value and that each and all of said warrants as to the principal and interest thereon constitute the legal, valid and binding obligation and promise of the plaintiff city to pay the same to the bearer or holder thereof, unless same should be held invalid by the court.

8.

This plaintiff would further show to the court that though he paid in warrants the amount of $3000.-00 and in said warrants as above said which constituted its valid, legal and binding promise and obligation to pay additional sum of $47,000.00 or the total of $50,000.00 for work and paving done on its said streets by the said construction company, said amounts being paid in cash and warrants as above said before such work was actually done except as to $3,000.00 of said warrants above said that the said construction company did perform in actual fact only $34,736.29 worth of street paving under said contract and supplemental contract as herein above referred to, and that it failed and refused and still fails and refuses upon the demand of this plaintiff either to do or perform the balance of said work amounting to $15,264.71 or to return to this plaintiff the amount of said warrants in excess of the work so done, which plaintiff alleges to be $15,264.71, and this plaintiff further alleges that upon the failure and refusal of said construction company to do and perform said work or repay the plaintiff the amount of $15,264.71 in excess which had been paid to said construction company or return to the plaintiff $15,264.71 of said warrants, the plaintiff demanded of H. W. Head under the terms of his obligations as above herein set forth to indemnify the plaintiff against loss by the issuance and delivery of such warrants as above said, that he either reimburse the city for the amount of excess so paid

or deliver to the city of said warrants to the amount of $15,264.71, and that said Head above failed and refused the demand of the plaintiff and whereupon it made a like demand of the defendant the Southern Surety Company and that said defendant failed and refused and still fails and refuses to comply with said demand in whole or in part, and for all of which the defendants and each of them, except the defendant Brown-Crummer Investment Company have become and are liable to this plaintiff.

And the plaintiff further says that it made proper and due demand for the other amounts herein alleged to be due it from the said construction company, the said Levy's and the said H. W. Head and the said Southern Surety Company, as due from said construction company to it by reason of the issuance and the delivery to said company of said warrants, and that upon the default of said company, the said Head became liable under and by virtue of his obligations to this plaintiff to pay said amounts, or to return to plaintiff said warrants, but which he failed and refused to pay and failed and refused to deliver to the plaintiff the warrants isued by it in excess of the work done and material furnished, and thereupon plaintiff made its demand of the said surety company under its obligation to, and for which it had become liable to the plaintiff upon the default of said Head, and that said surety company failed and refused to pay said amounts or any part thereof, all of which was to the great damage of the plaintiff.

9.

This plaintiff would further show to the court that the obligations of said Head as above herein set forth were that, among other things; In the event of any disputes, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the Southern Construction Company so as to in any way affect the said ten thousand of warrants (under the first obligation of date Sept. 10, 1919) or so as to affect the $37,000.00, in warrants (under the obligation of date Oct. 4th, 1919) I hereby agree to protect and indemnify the City of Gainesville, Texas up to the sum of $10,000.00 (under the first obligation) and up to $50,000.00 (under the second obligation of date Oct. 4th, 1920), and that the obligation of the Southern Surety Company was to protect and indemnify the City of Gainesville, Texas, in case of default on the part of said H. W. Head, and in this connection this plaintiff would show to the court that there is an error by way of date in the second obligation of the Southern Surety Company to which is attached the obligation of H. W. Head of date Oct. 4th, 1920, in that said surety company's obligation bears date of Sept. 20, 1920 and refers to an obligation of Head dated Sept. 10, 1920, when the attached obligation of Head which is made a part of said obligation is dated Oct. 4th, 1920, and that the error of date in the surety company's obligation is that it should have been Oct. 20th instead of Sept. 20th, and that it should have made refer-

ence to the date of Head's obligation as of Oct. 4th, 1920 instead of Sept. 10th, 1920 and that it was the intention of said obligation on the part of the surety company to which was attached the obligation of Head of date Oct. 4th, 1920, to cover said obligation of Oct. 4th, 1920, and not the obligation of date Sept. 10, 1920.

10.

This plaintiff would further show to the court that one of the provisions of the said contract and supplemental contract made by the Southern Construction Company with the plaintiff city, was as follows, "The undersigned bidder (meaning the Southern Construction Company) agrees to complete the work upon which it has bid within 180 working days from the acceptance of his bid by the city."

This plaintiff would show to the court that the terms of the said contract to do said paving work, and the supplemental contract both of which were made on the 20th day of Nov. 1919, were adopted and accepted by the plaintiff city on the 16th day of December, 1919, by the enactment, passage and adoption of the ordinance herein above referred to and made a part of this petition as Exhibit "A" and the plaintiff would further show that the said construction company has not completed its paving work under said contracts to exceed the sum of $34,736.29 and that the paving work under said contract even to the extent of $34,736.29 was not completed under the term and provisions of its said contract with the plaintiff until about the 1st day of July, 1921, and the

plaintiff here alleges that one of the provisions of its said contract with the said construction company was that said company would be liable to the plaintiff's city engineer, to-wit, R. G. Caraway Company for each and every working day that said company should use in the performance of its said paving work under said contract in excess of the said 180 days in the sum of $25.00 per day, and the plaintiff further alleges that the time employed by said company in doing said $34,736.29 worth of work was 215 working days in excess of the 180 days, and plaintiff further alleges that on account of the matters and things herein alleged the Southern Construction Company, and Harry D. Levy and Lester Levy became liable and bound to pay the R. G. Caraway Company, the plaintiff's city engineer, the sum of $5357.00 which it further alleges was transferred and sold to plaintiff by said R. G. Caraway Company for a valuable consideration.

The plaintiff would further show to the court that the defendants Southern Surety Company and Harry D. Levy and Lester Levy have become and are liable for said sum, but have failed and refused and still fail and refuse upon demand to pay the same or any part thereof.

11.

Plaintiff further alleges that the defendant Southern Construction Company and the defendants Harry D. Levy and Lester Levy are each further due

the plaintiff the sum of $2793.79 on the following account:

That, in doing said paving work, the plaintiff city furnished to the said construction company 126,300 gallons of water, 1000 gallons of which was furnished at the agreed rate of 50 cents per 1000 feet and 125,300 gallons at the agreed rate of 25 cents per 1000 gallons making a total of $31.83. That the plaintiff also furnished to the said construction company in doing said paving work a truck for a period of 17 days at the agreed price of $170.00, and also furnished said company a grader for one fourth of a day at the agreed price of $3.71 and for engineering fees collected from the property owners under the said contract, which said fees belong to the plaintiff, to the amount of $2583.21, the whole totaling the sum of $2793.79, all of which is long past due and which the defendants construction company and Harry D. & Lester Levy have failed and refused to pay in whole or in part, and for all of which they are liable to the plaintiff.

12.

The plaintiff alleges that the defendants, the Southern Construction Company and Harry D. & Lester Levy, have each and all failed and refused to return to plaintiff on demand the pavement warrants and failed and refused to pay upon the demand of the plaintiff the said sum of $15,264.71, being the excess of the warrants delivered to them by the plaintiff over and above the work actually done under said contract

for paving and that they and each of them have failed and refused and still fail and refuse to pay the damage in the sum of $5375.00 on account of damages for delay in completing the paving work to the extent of $34,736.29, as alleged in paragraph 9, herein above, and for which they are liable to the plaintiff and that said defendants have failed and refused to pay the plaintiff the amount due for the water, the truck, and the grader furnished by the plaintiff in doing said paving work, and that they and each of them have failed and refused to pay the plaintiff the amount of engineering fees $2,588.21, which with the amount for water, use of truck and grader amount to the sum of $2,793.79, and for all of which said defendants are liable, and that on account of all of said items the defendants the said Southern Construction Company and the said Harry D. and Lester Levy have become and are liable in the total sum of $22,963.21, and interest thereon from the 1st day of July, 1921.

13.

The plaintiff alleges that the defendant H. W. Head became and is liable to the plaintiff to return said warrants to it in excess of the paving done or for the payment of the above amounts and that a "dispute, discrepancy or other contingency," did arise which affected the warrants issued and the amount of work to be done by the said construction company, to the damage of the plaintiff, and against which the defendant Head by his said obligations herein above set out obligated himself and became bound to indemnify the city against loss in this:

That there was issued to the said construction company and delivered to it, $3000.00 in warrants and $47,000.00 worth of warrants which constituted the plaintiffs' obligation to pay and which were the legal, valid and binding promises of the plaintiff to pay unless held to be invalid by the court, which said warrants were issued, and said cash paid for paving work to be done under said contract, and which said warrants were assigned by said construction company and delivered to said Head, who in turn delivered and sold the same to the defendant the Brown-Crummer Investment Company, defendant, and received the money therefor and that thereafter the contingency arose under which the said construction company and the defendants Harry D. and Lester Levy failed and refused to do the paving work in excess of $34,736.29 although the plaintiff had paid them in warrants the sum of $50,000.00 and was entitled to that amount of work to be done; that said construction company and said Levys failed and refused to do said paving work beyond the sum of $34,736.29 and failed and refused to return said warrants to the amount of $15,264.71 and failed and refused to repay the city the difference between the amount of work done and the sum of $50,000.00, and failed and refused to return said warrants in excess of the paving work done; that thereupon, and upon said default the obligation of the defendant Head to the plaintiff he became liable to the plaintiff to indemnify it to the extent of $15,264.71 accrued, or return its said bonds in that

amount, and which plaintiff demanded that he would do but which he failed and refused to do, and upon his default, the liability of the defendant the Southern Surety Company accrued to the plaintiff under its obligations herein above set out, and the plaintiff made demand upon it to be indemnified, but it failed and refused to comply with its obligations and still so fails and refuses.

14.

Plaintiff further alleges that a "contingency, dispute and discrepancy" arose within the meaning of the obligation of said Head affecting said warrants and the work to be done, and upon the default of the Southern Construction Company and the defendants Levy, in so far as the amount of the damage arising from delay in performing the paving work as above set out in this:

That the warrants were issued as payment to said construction company in payment of said paving, and that the delay by way of damages accrued, which affected the work to be done, and the warrants issued in payment therefor, and the said construction company and said Levys disputed said amount so due, and took in lieu of said damage payment in said warrants to cover work actually done, and refused to pay said damage upon demand, whereupon the contingency arose which produced the accrual of the liability of said Head upon his said obligations as herein above set out, and upon demand of the said Head to make good the default of said construction company he failed and refused to do so or to indemnify the plaintiff

on said account, and thereupon the obligation of the said Southern Surety Company to the plaintiff by reasons of its obligations herein above set out to make good the default of said Head and indemnify the plaintiff, but that upon demand the said Southern Surety Company failed and refused to make good its obligation and indemnify the plaintiff.

15.

This plaintiff says that as to the sum of $205.54 on account of water furnished the construction company by the plaintiff and on account of truck and grader furnished as above alleged, for which the construction company and said Levys became liable and bound to pay the city, a "contingency, discrepancy and dispute" arose which affected the said warrants and the amount of work to be done, under the terms of the obligations of said H. W. Head, and within the meaning thereof for which he became liable in this: That the construction company and said Levys were to furnish the material, labor and so forth to do said paving work, and pay for the same and the plaintiff furnished the above items for said work, for which it was to receive pay and for which the said defendants refused upon its demand to pay, and upon said default arose the liability of said Head to the plaintiff, as to said items and said amounts, and which he failed and refused to pay or to indemnify the plaintiff for, and upon his default of the said surety company under the obligations made by it as herein above plead, became liable therefor to the plaintiff under its obligations, and upon demand

made upon it by the plaintiff it failed and refused to indemnify the city and thereby defaulted in its obligation to make good the default of the said H. W. Head.

16.

This plaintiff alleges that a "contingency, dispute and discrepancy" within the meaning of the terms of the written obligations of said H. W. Head arose which affected the warrants and the amount of work to be done, upon which said Head became and is liable for the payment of the sum of $2583.21 as engineering fees as above set out in this: That under the contract for paving made by the construction company and said Levys with the plaintiff, the plaintiff's engineer for and on behalf of the plaintiff was to receive said fees, which were by said construction company and said Levys collected, and by them retained, said fees belonging to the plaintiff under said contract and by assignment from the said city engineer, and that upon demand the construction company and said Levys failed and refused to pay, and thereupon the obligation of said H. W. Head accrued, and upon demand by the plaintiff he failed and refused to return said warrants or to indemnify the plaintiff, whereupon arose the obligation of the said surety company to indemnify the city, plaintiff, upon the default of said Head, and upon demand of the plaintiff of said surety company to so indemnify it, it failed and refused so to do.

17.

The plaintiff alleges that by reason of all the matters and things herein above set forth, the defendant

Southern Construction Company and the said Lester Levy and Harry D. Levy became liable and bound to return the warrants to plaintiff to said amount or bound to pay the plaintiff the said sum of $22,963.21 and which they failed and refused and failed to return said warrants and refused to pay, to the great damage of the plaintiff; that upon the failure and refusal of said defendants to so pay, or to return to the plaintiff the amount of warrants issued to and delivered to the said construction company, and which by said construction company and said Levys assigned to and turned over to said H. W. Head and by him sold and delivered to the defendant the Brown-Crummer Investment Company, and for which the said Head received payment a contingency, within the meaning of the obligation of said Head arose, which affected the amount of work done by the said construction company under its contract with the plaintiff, and the materials furnished by the Southern Construction Company so as to affect and did affect the warrants so issued by the plaintiff as herein above set out, and the obligation of the said Head to indemnify the plaintiff accrued, and whereupon the plaintiff made demand of said Head to either indemnify it by reimbursing it to the extent of said amount of $15,000 worth of warrants and the other sums hereinabove set out, or to return to it warrants to said amount, and that said Head failed and refused to indemnify the plaintiff or return said warrants, or any part of them, to the great damage of the plaintiff, whereupon the plaintiff made demand of the de-

fendant surety company to make good the default of said Head, which it failed and refused to do.

18.

This plaintiff would further show to the court that the defendant H. W. Head was further liable to the plaintiff for all the amounts above set forth, and upon his default, the Southern Surety Company became liable to the plaintiff therefor, on the following account, in addition to the matters and grounds of liability to the plaintiff herein above set out: That at the time said $10,000.00 worth of warrants were issued to the said construction company and at the time the $37,000.00 worth of warrants were issued to said company and at the time of the making of his obligations to the city, plaintiff, of date Sept. 10, 1920, and Oct. 4, 1920, respectively by the said Head to indemnify the plaintiff, the said Head was in truth and in fact a partner of the said Harry D. Levy and said Lester Levy and was sharing the profits with them in said contract with the plaintiff and was a full partner with them, doing business under the style and name of the Southern Construction Company, and this plaintiff further alleged that said Head had at all times herein mentioned a full, complete and accurate knowledge of the manner in which the said paving work was to be done and was done and had a full and complete knowledge of the conditions under which said warrants were issued to and delivered to the said construction company, and had a full and complete knowledge of the purpose for which the same was done and had a full and complete

knowledge of the fact that said warrants were so issued and delivered to said construction company before half the said paving work was done by said construction company, and that said Head well knew, and the plaintiff here alleges the fact to be that the real and intended meaning of the said obligations of the said Head to it as hereinabove set forth, was to protect and indemnify it in delivering said warrants to said construction company before said work was actually done, in the event that said construction company did not do the $50,000.00 worth of work for which it had been half paid, and that said Head well knew that it was his purpose and the purpose of his associates, the said Harry D. Levy and Lester Levy doing business under the style and name of the Southern Construction Company, to get possession of said warrants and sell them, and they did sell them, and use the proceeds thereof to finance themselves in the doing of said paving work for the plaintiff and receive and divide among themselves the profits thereof.

19.

The plaintiff further alleges, that as hereinabove set out the plaintiff city issued its said warrants as is herein alleged, payable as is herein alleged and that to-wit, on or about the .... day of ..... 1921 and prior to the filing of this suit it was agreed by and between the plaintiff, the defendant Head, the defendant Southern Construction Company and the said Lester Levy and Harry D. Levy that the amount of work done by the said Southern Construction Company for the

said city, plaintiff, amounted to the sum of $34,736.29, for and on account of which said warrants were issued by the plaintiff and delivered as herein before alleged, and that there remained at that time due and owing said city in work or money the value of or the amount of $15,264.71 on the account of the issuance and delivering of said warrants, and plaintiff alleges that it was agreed at the said time by and between said parties that after a full investigation by all of said parties of the amount of work that had been done under the said contract by the said Southern Construction Company for the plaintiff city and after a full check of all the figures available and connected therewith, that there was still due and owing said city the said sum of $15,264.71, and that said sum was owing and unpaid and constituted a liability in favor of the plaintiff city for said sum of money or the equivalent thereof in paying money or the return of warrants to said amount to it, and for all of which it was agreed and understood that the said Southern Construction Company and the said Head, as is herein above alleged, and his surety the Southern Surety Company was liable.

And that it was agreed and understood by all parties, the said Harry D. Levy and Lester Levy and the said H. W. Head for himself and as attorney for the said Southern Surety Company, that said amount of $15,264.71 was due said city, plaintiff, as being the amount represented by the dif-

ference between the paving work done and the amount of warrants issued and delivered to the said Construction Company and by it delivered to said Head and to which extent the said Head and the said Southern Construction Company were both and each liable to the plaintiff city, and said amount was fully agreed upon and accepted by all parties thereto, that the said obligation to the plaintiff city, could and would be settled either by the return of the said warrants issued as above said to that amount or by the payment of that amount to the city in cash. That said settlement as to said amount and to said extent was fully agreed upon by said parties thereto at said time and was fully accepted by all parties at said time, and the plaintiff here now pleads said agreement and settlement as binding upon all parties thereto as to the amount of paving work actually done, and as to the amount of warrants to which it is entitled by way of return and the amount of money in lieu of said warrants to which it is entitled in settlement and satisfaction of its claim against said H. W. Head or his estate and the said Southern Surety Company.

And this plaintiff would further show to the court that, since the agreement and understanding was had and made as herein alleged, no further work has been done for this plaintiff under said contract and no money has been paid to it by either of the defendants toward the liquidation of said sum of money due and owing it. And plaintiff further al-

leges that there is now due and owing it on account of the matters and things therein alleged by the defendant Head, and his surety the defendant the Southern Surety Company and the other defendants herein, except the Brown-Crummer Investment Company the said sum of $15,264.71, and for all of which the said defendants have become and are liable, together with interest on said sum from the first day of October, 1921 at the rate of 6 per cent per annum, for all of which this plaintiff sues and asks judgment.

This plaintiff would further show to the court that since the 10th day of March, 1924 the said defendant the Brown-Crummer Investment Company has claimed and admitted that it is the owner of the said unpaid warrants so issued by the plaintiff city as hereinabove alleged and that it has on numerous occasions since that date demanded of the plaintiff city the payment of the interest which is alleged and claimed to be past due said warrants and has undertaken to collect the said interest as the owner of said warrants and entitled to the interest payment thereon, and this plaintiff here and now alleges the fact to be that the Brown-Crummer Investment Company is the present legal and equitable owner and holder of said warrants and is entitled to receive the interest payments thereon if it should be held and adjudged by the court that said warrants are valid and binding obligations upon the city to pay, and the plaintiff further alleges that it fears that

during the pendency of this suit the Brown-Crummer Investment Company will dispose of said warrants or part with its title thereto, to the great injury and damage of this plaintiff, and against which threatened damage it has no adequate remedy at law, unless restrained from so doing by proper order of this court. And in this connection, plaintiff would further show to the court that at the time it purchased said warrants and received delivery of the same and prior thereto, and at all times herein mentioned the said defendant, the said Brown-Crummer Investment Company, had and possessed a full and complete knowledge of all the proceedings had and done by the plaintiff city and its council with reference to the said paving contract hereinabove mentioned and with reference to all the proceedings had and done by the plaintiff city in the issuance of its said warrants and the manner of their issuance and of all the circumstances and facts connected therewith.

And this plaintiff further alleges and shows that by the original answer of the defendant, the Brown-Crummer Investment Co. filed in the District Court of Cooke County, Texas on the 21st day of January, 1924, it plead (1st) by general demurrer, (2) by special exceptions numbers one and two and (3) by general denial and (4) by general and specific denial in which was included a plea of disclaimer in the following language, to-wit:

"This defendant further says that it was not at the time of the filing of this suit and is not now

the owner of any of the warrants and is without knowledge of the ownership of said warrants or any of them or the coupons attached thereto or detached therefrom, that in all payments heretofore made by the City of Gainesville to this defendant on the principal and interest of said warrants were made to it as fiscal agent of the City of Gainesville and only such funds were paid by it as such fiscal agent of said City of Gainesville to the owners of said owners and holders of said warrants, and interest coupons, who presented same to the office of the Brown-Crummer Investment Company, at which office warrants and interest coupons were made payable:

That this defendant had no other or further interest in said warrants or interest coupons than to submit the same to the said treasurer or plaintiff for payment and to receive payment from the city of said warrants and interest coupons for the owners and holders thereof."

That at the January term, 1924 of the said Cooke County District Court said cause came on to be heard and it was agreed by and between all parties thereto that said case should be continued with the understanding that in order to avoid the expense to the defendant, the Brown-Crummer Investment Company and the inconvenience of bringing from Kansas City, Mo. a witness in its behalf to testify under the disclaimer above set forth, and which was to be presented on the trial of the merits of the case, it was agreed that said witness might then testify fully

and this testimony should be taken with the understanding that it could be used upon the trial of the case as tho the witnesses were present then to testify. And said testimony was so taken and said witness testified in substance under said disclaimer that the said Brown-Crummer Investment Company did not at said time nor at the time of filing of the suit, own said warrants or any part thereof, and that the court thereafter and without knowledge of the plaintiff and upon said testimony entered an order dismissing the said Brown-Crummer Investment Company from said suit and that thereafter the said Brown-Crummer Investment Company in the face of the testimony offered under oath by its witness as above said admitted to the plaintiff that it did own said warrants and all of them and had so owned all of said warrants every since they were sold to it by the said Head, and this plaintiff further shows to the court that when it by amended petition in the District Court of Cooke County reimpleaded the said Brown-Crummer Company upon its ownership of said warrants and on its admission of the fact it then filed a petition in said court for the removal of said cause to the United States District Court for the Eastern District of Texas, and in said sworn application or petition admitted that it was the owner of all of said warrants and by its plea now before this court admits that it is the owner of all of said warrants.

Wherefore the plaintiff says that the said Brown-Crummer Company is now stopped to set up the plea

of *res adjudicata* on account of the order improvidently entered by the District Court of Cooke County and recorded in Volume 15, page 58 of the Civil Minutes of said court.

21.

Plaintiff further says that at the time of the filing of this suit and that all times since and at this time the said H. D. Levy, the said Lester Levy and the said Southern Construction Company have been, both, each and all of them, and now are wholly and notoriously insolvent.

22.

This plaintiff further says that on the 4th day of October, 1921 the plaintiff procured a judgment against the defendant H. W. Head and the Southern Surety Company and the Southern Construction Company, a partnership composed of Harry D. Levy and Lester Levy, jointly and severally in the sum of $15,000.00 with interest from that date at the rate of 6% per annum, and that on said date the plaintiff recovered of said construction company, a partnership composed of Harry D. and Lester Levy the further sum of $9435.00 with interest thereon. That the defendants H. W. Head and Southern Surety Company appealed from a judgment or order refusing to vacate said judgment, and that the Court of Civil Appeals for the 6th District reversed said judgment as to said Head and said surety company and remanded this cause for a new trial, but left said judgment

undisturbed as to the other defendants. And in this connection this plaintiff would show to the court that upon said appeal the said appealing defendants plead, among other things, in substance, which were not adjudicated by the judgment of the said Court of Appeals, that the warrants issued by the plaintiff and delivered to the construction company and by it delivered to Head and by said Head sold and delivered to the defendant the Brown-Crummer Investment Company were not valid, legal obligations on the part of the city to pay and that said warrants were void and unenforceable against this plaintiff, and that it therefore had no cause of action against the said Head and said surety company because it had suffered no loss by the issuance and the delivery of said warrants.

23.

This plaintiff further pleads in the alternative that if it be true, that said warrants are void, and the court should so hold, then the plaintiff prays that the said warrants be cancelled and declared void by the court and in this connection this plaintiff says that some of said warrants have already matured and have been paid to the said Brown-Crummer Investment Company, the present owner and holder of said warrants, plaintiff having paid all the said warrants that have so matured both principal and interest and that it has also paid all the matured interest on all of said warrants to this time, and in addition to having

said warrants declared void, this plaintiff prays for judgment against the said Brown-Crummer Investment Company for all the amounts that it has paid to said company on said warrants by way of both principal and interest, and in this connection asks for all such relief to which it may be entitled.

24.

The plaintiff says that since the judgment in this cause was rendered on the 4th day of October, 1921, the said H. W. Head has died and that the defendant H. O. Head is the executor of the estate of said H. W. Head deceased, and that said estate is liable for all the obligations of the said H. W. Head as herein above set forth and plead.

25.

This plaintiff further says that the said Southern Construction Company and the said Harry D. Levy and Lester Levy doing business under the style and name of Southern Construction Company, and the said Harry D. and Lester Levy, individually, are each and all notoriously insolvent and it further says that the residence of the said Levys is now outside the State of Texas.

26.

The plaintiff pleads that it already had judgment against the Southern Construction Company, a partnership composed of Harry D. and Lester Levy, and against the said Harry D. and said Lester Levy individually, but if it be mistaken in its allegation that

it has judgment for the amounts herein sued for against the said Lester Levy and Harry D. Levy, individually and jointly and severally, then it says that both and each of them have been served with citation herein individually, and it prays for such judgment against both and each of them to which it may be entitled.

27.

The plaintiff would further show to the court that upon account of the matters and things herein alleged, there arose such a dispute, discrepancy and contingency as affected the amount of work to be done and the materials to be furnished by the said construction company under its said contract for paving work with the plaintiff so as to affect and did affect the said warrants issued by the plaintiff and delivered to the construction company and by it assigned and delivered to said H. W. Head, and by him sold and delivered to the defendant Brown-Crummer Investment Company, defendant, and for which the said Head received payment because and for the reason, that, within the meaning of the obligations of said Head to the plaintiff as herein above set forth and within the meaning and contemplation of the parties thereto, the obligation of said Head was, in substance and effect and meaning, contemplation and import, to indemnify the plaintiff against loss on account of the delivery of the said warrants to the construction company for the paving work to be done, before the same was actually done, in the event that the said

construction company should fail or refuse to do the amount of work under said paving contract and in the way and manner and within the time provided equal to the value of the said bonds at their par value, and which this plaintiff alleges that the said construction company did fail and refuse to do the extent of $15,264.71, and that the said Head and the said surety company both and each in turn became liable to the plaintiff therefor and which both and each of them failed and refused to make good, either by a return of said warrants or by payment in cash and this plaintiff further says that both the said Head and the said surety company became liable to this plaintiff for the other sums herein above mentioned upon the default of the said construction company and the said Levys, and that the said Head defaulted upon the demand of the plaintiff to fulfill his obligations to it and that the said surety company defaulted in its obligations to the plaintiff upon its demand upon the default of the said Head, and that each and all of the defendants herein named with the exception of the Brown-Crummer Investment Company, have become and are liable to the plaintiff for the amounts herein above set forth.

28.

Wherefore, for each and all the above reasons, the plaintiff says that the defendants Harry D. Levy and Lester Levy and H. O. Head, executor of the estate of H. W. Head deceasel, and the Southern Surety Company, are each and all liable to it for the

said sums herein above set forth, and which they and each of them have failed and refused to pay to the great damage of the plaintiff in the sum of $22,963.21 and for which the plaintiff asks judgment.

This plaintiff would further show to the court that the defendant, Brown-Crummer Investment Company is a Kansas Corporation, but has an agent in the State of Texas on whom service of citation may be had and that it fears that during the pendency of this suit the said defendant will sell, transfer or dispose of said warrants to some person or corporation not a citizen of this state and upon whom no service of citation could be had, or dispose of said warrants to various and numerous corporations or parties widely scattered over the United States, which would greatly delay if not entirely prevent a proper adjudication of its rights as herein alleged as to the cancellation of said warrants, and against which it has no adequate remedy at law.

Wherefore, as to the said Brown-Crummer Investment Company, defendant, plaintiff prays that it be enjoined and restrained from selling, conveying or assigning said warrants or any of them, during the pendency of this suit, and for such other restraining order as will protect the interest of the plaintiff herein with respect thereto.

Wherefore the plaintiff says that the defendant, Southern Construction Company, has answered herein and judgment having been rendered against it in the Cooke County District Court and that the defend-

ant Harry D. and Lester Levy have been served a citation herein and that the Southern Surety Company have waived service and answered herein, and that H. O. Head executor of the estate of H. W. Head, deceased and the Brown-Crummer Investment Company both and each have answered herein, it therefore upon final hearing prays that it have judgment against each of the defendants, jointly and severally for the return to it of warrants issued by the plaintiff as hereinbefore set forth, to the amount of $15,-264.71, and in the alternate if said warrants or bonds cannot be returned to it or the defendants fail or refuse to return the bonds or warrants of said amount, then it prays that it have judgment for the said amount of $15,264.71, as to each and all the said defendants jointly and severally except the said Brown-Crummer Investment Company in the alternate it prays that it have judgment against the Brown-Crummer Investment Company, declaring all of said warrants or bonds invalid and void, and that it have judgment cancelling the same and that it have further judgment against it for all amounts and sums paid to it on account of said warrants by way of both principal and interest and plaintiff further prays for both amounts and for general and special relief as to all of the defendants, both in law and in equity to which it may be entitled, and for cost of suit.

W. L. Blanton,
W. L. Moore,
Attorneys for Plaintiff, City of Gainesville, Texas.

I, W. L. Blanton, on oath state that I am city attorney of the City of Gainesville and that the matters and things set forth and alleged in the above amended petition are true.

W. L. Blanton,

Sworn to before me this 16th day of Feby 1926.
(Seal) .....
Notary Public, Cook County, Texas.

EXHIBIT A.

City Hall.
City of Gainesville, Texas.
December 16th, 1919.

The City Council of the City of Gainesvill, Texas, met in regular session, at the City Hall, in said City, on this the 16th day of December, A. D. 1919.

Present:

E. N. Blackburn Mayor.
Geo. A. Beck
J. A. Thomas
J. E. Bramble
C. M. Buckingham
W. B. Nowell
Lee Lewis
J. W. Puckett Aldermen.
R. L. Kendall

and S. A. Bryan, City Secretary.

Absent: None.

a quorum was announced present, when the following proceedings, among others, were had, to-wit:

The Mayor presented to the Council, for consideration and passage and ordinance entitled—"An

ordinance confirming contract between the City of Gainesville and the Southern Construction Company a co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the City of Gainesville Texas, in accordance with proposal of contract and plans signed by both parties thereto and made a part thereof: Providing for the issuance of City of Gainesville street improvement warrants as evidence of the city's debt therefor: Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity: And declaring and emergency."

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be read in full, motion carried and the ordinance was read by the secretary.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance pass its first reading.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the rule requiring ordinances to be passed at three several meetings of the City Council be suspended and that said ordinance pass its second and final reading by caption.

Ayes: Alderman, Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Said ordinance was read second time, by caption, and passed by the following vote:

Ayes: Alderman Beck, Thomas Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that said ordinance be placed upon its third and final passage.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be finally passed.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

The ordinance as follows:

"An ordinance confirming contract between the City of Gainesville and the Southern Construction Company, a co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the City of Gainesville, Texas, in accordance with proposal of contractor and plans signed by both parties thereto and make part thereof: Provided for the issuance of City of Gainesville street improvement warrants as evidence of the city's best therefor:

Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity: And declaring an emergency:"

Whereas, the city council of the City of Gainesville, Texas, has heretofore determined the necessity for the construction of certain street improvements and the city council, and the City of Gainesville, pursuant thereto, on the 20th day of November, 1919, acting by and through its mayor and city secretary and the said Southern Construction Company, a copartnership, contractor, entered into contract for the construction of said street improvements in accordance with plans, specifications, and proposal which are attached to and form a part of said contract, which is in words and figures as follows, to-wit:

Proposal.

To the City of Gainesville, Texas
Gentlemen:

Pursuant to the foregoing instructions to the bidders the undersigned bidder proposes to do all the work furnish all the material upon which he bids, as provided by the attached plans and specifications, and binds himself on acceptance of his proposal to execute a contract and bond, according to the attached forms, for the performance and completion of the said work in the time specified.

Items—Written Price	Figures
Price per sq. yd. for 3" vertical Fiber Brick pavement complete on a 5" concrete foundation—Three and 40/100 Dollars.	3.40

Price per sq. yd. for 3″ vertical Fiber Brick pavement complete on a 4″ concrete foundation—Three and 20/100 Dollars.	3.20
Price per sq. yd. for 2½″ vertical Fiber Brick pavement complete on a 5″ concrete foundation—Three and 25/100 Dollars.	3.25
Price per sq. yd. for 2½″ vertical Fiber Brick pavement complete on a 4″ concrete foundation—Three and 05/100 Dollars,	$ 3.05
Price per sq. yd. for Tarvia treatment pavement complete on a 6″ gravel foundation —One and 23/100 Dollars,	1.23
Price per lin. ft. for stone concrete comb. curb and gutter—Eighty Cents	.80
Price per lin. ft. for gravel concrete comb. curb and gutter—Seventy five cents	.75
Price per lin. ft. for stone concrete comb. curb and gutter—Eighty Cents	.80
Price per lin. ft. for gravel concrete separate curb—Fifty Five Cents	.55
Price per lin. ft. for stone concrete separate curb—Sixty Eight Cents	.68
Price per lin. ft. for gravel concrete separate gutter—Forty Eight Cents	.48
Price per lin. ft. for stone concrete separate gutter—Fifty Seven Cents	.57
Price per lin. ft. for stone separate curb —Forty Five Cents	.45
Price per lin. ft. for oak headers in place—Fifty Cents	.50
Price per cu. yd. for concrete in Culverts, etc. —Eighteen Dollars	18.00
Price per lb. for reinforcing steel in Culverts, etc.—Thirty Five Cents	.35

Price per cu. yd. for earth excavation—Seventy Five Cents	.75
Price per cu. yd. for rock excavation—Three Dollars	3.00
Price per cu. yd. for over haul per 100 ft. —Two cents	.02
Price per pound for Culvert plates—Twenty Five Cents	.25
Price each for Catch Basins complete in place —Fifty Five Dollars	55.00
Price per sq. ft. for four inch cement walk —Twenty Three Cents	.23
Cost per day for common labor on extra work—Four Dollars	4.00
Cost per day for team labor on extra work —Seven Dollars	7.00

The undersigned bidder agrees to accept deferred payments on contracts with property owners in One (1) and Two (2) years, and to charge interest on the same at the reate of Eight (8) per cent per annum.

The undersigned bidder agrees to complete the work upon which he has bid, within One Hundred Eighty (180) working days, from acceptance of his bond by the City.

Southern Construction Company
By Harry D. Levy,
Dallas Texas.

Contract.

The State of Texas, County of Cooke:

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the

City of Gainesville. Cooke County, Texas, party of the first part, hereinafter called the City, and the Southern Construction Company, of Dallas, Texas, party of the second part, hereinafter called the Contractor.

Witnesseth: That for in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to commence and complete the construction of certain street improvements and all extra work in connection therewith as stated in the General Specifications, and at his own proper cost and expense to furnish all tools, materials, machinery labor, supervision and other accessories necessary for the said construction in accordance with the conditions and prices stated in the proposal attached hereto, and in accordance with the plans and specifications therefor as signed by the parties hereto, all of which are made a part hereof, and all in the manner and under the conditions hereinafter specified:

All the provisions of this agreement shall be performed in the City of Gainesville, Texas, and any suit to enforce its provisions or for damages for breach thereof shall be brought in Cooke County, Texas.

In witness whereof, the City has caused its seal to be hereto affixed, and these presents to be signed by its Mayor and attested by its City Secretary, and the Party of the Second part have hereto set their hands

and seal on the day, month and year first above mentioned.

Attest:

S. A. Bryan
City Secretary.

The City of Gainesville, Texas,
Party of the first part.
By E. N. Blackburn, Mayor.
The Southern Construction Company,

Witness:
R. G. Carraway.

Party of the second part.

Supplemental Contract.

The State of Texas, County of Cooke:

Know All Men By These Presents:

That, whereas, under date of November 20th, 1919, a contract was made by and between the City of Gainesville, Cooke County, Texas, and the Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy, of the State of Texas and County of Dallas; providing for certain street improvements to be made by said Southern Construction Company for said City of Gainesville, which contract is duly of record in the Minutes of the City Council; and

Whereas, on the same date a supplemental contract was made by and between said parties, authorizing a modification of the provisions for a bond in said contract, which supplemental contract is also duly of record in the minutes of said city council; and

Whereas, said contract provides for payments to be made in money by said City of Gainesville for said labor, materials and supervision; and

Whereas, it now appears to all parties that the City of Gainesville will not have funds in money available for said purpose, as payments shall become due;

Now, therefore, for and in consideration of the extension of the maturities in the payments for said labor, materials and supervision, the said City herrby agrees to issue in payment for said labor, materials and supervision interest bearing warrants, to be designated "City of Gainesville Street Improvement Warrants, Series .....," to be dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, interest payable semi-annually on such dates as may be found advisable by said City, maturing serially in approximately one (1) to twenty (20) years; and

Whereas, in consideration of the interest to be paid on said warrants, which is hereby made a part of the contract price, the Southern Construction Company has agreed to accept said warrants in payment for said labor, materials and supervision, said warrants to be issued upon the completion of said contract or upon legally approved estimates;

Now, therefore, it is hereby agreed that the payments under the terms of this contract shall be made as herein specified and said city, through its duly authorized officials, binds itself to issue legal warranrs for said purpose.

In witness whereof, we have hereunto set our hands and seals this the 20th day of November, 1919. Executed in duplicate.

The City of Gainesville, Texas.
By E. N. Blackburn, Mayor.

The Southern Construction Company.
By Harry D. Levy,
Lester Levy.

Attest:
S. A. Bryan,
City Secretary.

And, whereas, said contract, and supplements thereto is based upon specifications prepared and submitted to and approved by the mayor and city council, and was let and entered into after proper advertisement inviting competitive bids for the work proposed to be done, which advertisement is as follows:

Notice to Paving Contractors.

Sealed bids will be received until 8:00 P. M. November 18th, 1919, by S. A. Ryan, Secretary of the City of Gainesville, Texas for furnishing all material and labor for the construction of approximately 31,000 square yards of street paving, 10,000 lineal feet curb and gutter. A certified check for the sum of $1000.00 payable to the order of Hon. E. N. Blackburn, Mayor, must accompany each bid. Plans and specifications may be obtained at the office of the engineer R. G. Carraway Company, Gainesville, Texas, upon a deposit of $10.00. The City of Gainesville, Texas, reserves the right to reject any or all bids and to waive formalitires.

Which said advertisement appeared in the Daily and Weekly Hesperian, a daily newspaper published in said City of Gainesville, in the issues of the 6th day of November, 1919, to the 16th day of November, 1919, in not less than ten issues; and

Whereas, all bids submitted were sealed and opened in the presence of a majority of the aldermen, and did remain on file in the Mayors Office open for public inspection at least forty eight hours before said contract was awarded to the successful bidder, and in said advertisement the city reserved the right to reject any and all bids and pending the advertisement of the work and contract proposed specifications therefor did remain on file in the office of the mayor subject to inspection of all parties desiring to bid.

Whereas, said Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy of the County of Dallas, State of Texas, have given a bond in accordance with Section 29 of the charter of said city securing the faithful performance of said contract and securing the rights of sub-contractors, materials men and laborers.

And whereas, said contract has been read and duly considered and understood.

Therefore, be it ordained by the City Council of the City of Gainesville, Texas:

That said contract be and the same is hereby in all things approved, ratified and confirmed as the act and contract of this council of the City of Gainesville, Texas, and the same shall have effect according to its tenor and

purpose; and it being agreeable to the parties signing said contract that payment for said street improvements be made by the issuance of six per cent (6%) interest bearing street improvement warrants, maturing one (1) to twenty (20) years, which warrants the City of Gainesville has agreed to issue, and the said Southern Construction Company, Contractor, has agreed to accept in payment therefor:

Therefore, it is further ordained that in accordance with said contract and agreement, warrants of the City of Gainesville to be called "City of Gainesville Street Improvement Warrants, Series....." be issued in the sum of fifty thousand ($50,000.00) dollars, payable to the said Southern Construction Company, Contractor, their assigns or bearer, evidencing the indebtedness due said contractor by the City of Gainesville, under and by virtue of said contract.

Said warrants shall be numbered from one (1) to fifty (50) inclusive, shall be in the denomination of one thousand ($1,000.00) dollars each, aggregating fifty thousand ($50,000.00) dollars, shall be dated November 20th, 1919, and shall become due and payable as follows, to-wit:

Warrant Numbers	Maturity Dates	Amount
1-2	March 1, 1921	$2000.00
3-4	March 1, 1922	2000.00
5-6	March 1, 1923	2000.00
7-8	March 1, 1924	2000.00
9-10	March 1, 1925	2000.00

11-12	March 1, 1926	2000.00
13-14	March 1, 1927	2000.00
15-16	March 1, 1928	2000.00
17-18	March 1, 1929	2000.00
19-20	March 1, 1930	2000.00
21, 22-23	March 1, 1931	3000.00
24,25-26	March 1, 1932	3000.00
27, 28-29	March 1, 1933	3000.00
30, 31-32	March 1, 1934	3000.00
33, 34-35	March 1, 1935	3000.00
36, 37-38	March 1, 1936	3000.00
39, 40-41	March 1, 1937	3000.00
42, 43-44	March 1, 1938	3000.00
45, 46-47	March 1, 1940	3000.00

Said warrants shall bear interest at the rate of six per cent (6%) per annum from date until paid, interest payable March 1st, 1920, and semi-annually thereafter on the 1st day of September and on the 1st day of March of each year; principal and interest on said warrants shall be payable at the offices of the Brown-Crummer Investment Company, Wichita, Kansas.

Said warrants shall be signed by the mayor, countersigned by the city secretary, and registered by the city treasurer and the seal of the city shall be impressed upon each of them. The facsimile signatures of the mayor and city secretary may be lithographed upon the coupons attached to each of said warrants.

Said warrants shall be in substantially the following form:

No. .....

United States of America.

State of Texas, County of Cooke.

City of Gainesville

Street Improvement Warrant,

Series.....

This is to certify that the City of Gainesville, County of Cooke, State of Texas, for value received is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19..., at the offices of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the city treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This warrant is one of a series of fifty (50), inclusive, in the denomination of one thousand ($1,000.00) dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and Laws of the State of Texas, and pursuant to an ordinance passed by the city council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570, *et seq.*, of the minutes of said city council.

The date of this warrant, in conformity with the ordinance above mentioned is November 20th, 1919.

And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said city, including this warrant, does not exceed any constitutional or statutory limitation.

In witness whereof the City of Gainesville has caused the corporate seal of said city to be hereto affixed and this warrant to be signed by its mayor, and counter-

signed by its city secretary and registered by the city treasurer, as of the date last above written.

Countersigned:

S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

E. N. Blackburn,
Mayor, City of Gainesville, Texas.
W. E. Germany,
City Treasurer, City of
Gainesville, Texas.

The form of interest coupon shall be substantially as follows:

No. ..... On the 1st day of March, 1920. $30.00 the city treasurer of the City of Gainesville, Texas, will pay to The Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of thirty ($30.00) dollars, the same being six months interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ..... No. ....., dated November 20th, 1919, to which this coupon is attached and is a part thereof.

E. N. Blackburn,
Mayor.

S. A. Bryan,
City Secretary.

Said warrants shall be executed and delivered to the said Southern Construction Company, contractor, upon completion of their contract in accordance with the terms and provisions thereof, upon certified state-

ment of account, or upon estimates of materials which have been furnished and labor which has been performed and accepted by said city prior to the date of approval of such estimates, such delivery to be made only after inspection of materials furnished and labor performed under said contract, and acceptance of said materials and work by the city council.

Be it further ordained by the city council that, to pay the interest and create a sinking fund sufficient to retire said warrants at their maturity, a tax of and at the rate of eight (8c) cents on the one hundred dollars' valuation of taxable property in said City of Gainesville, out of the tax of $1.50 on the one hundred dollars' appraised valuation of property in said city levied annually for general purposes and for the purpose of paying interest and providing the sinking fund on the bonded indebtedness and for the maintenance of public schools of said city, as provided in Sec. 1, Art. 3, of the Special Charter of the City of Gainesville, Texas, enacted by the 31st Legislature of Texas, at its regular session, is hereby levied for the year 1919; that during the year 1920, and each year hereafter while any of said warrants are outstanding and unpaid, and at the time other city taxes are levied in each of said year, there shall be computed and ascertained what rate of tax, based upon the latest approval tax rolls of said city will be necessary, requisite and sufficient to fully make, raise and produce in each of said years, the amount of principal necessary to be raised for that year plus the interest maturing in said year upon the amount of this series of warrants maturing

in said year, and for each of said years there is hereby ordered to be levied, assessed and collected, in due time, form and manner a tax at such rate as shall be found necessary as aforesaid, and all of the proceeds from such taxes shall be placed in a separate special fund for this series of warrants, known and designated as "Special Street Improvement Warrant Fund," and the city treasurer shall not honor any draft upon said fund or pay out any of the same, except in the payment of interest on said warrants or for retiring the same.

The fact that the streets of the city are in a deplorable condition the present severe weather making them almost impassable create a public emergency and an imperative public necessity that the rule requiring ordinances to be read at three several meetings be suspended and that this ordinance take effect from and after its passage and it is so ordained.

Passed this the 16th day of December, 1919.

Approved this the 16th day of December, 1919.

E. N. Blackburn,
Mayor, City of Gainesvill, Texas.

Attest:

S. A. Bryan,
City Secretary, City of Gainesville, Texas.

Endorsed:

No. 241 At Law. City of Gainesville et al *vs.* Southern Construction Co. et al. In the U. S. Dist. Court for the Eastern Dist. of Texas at Sherman Texas. Plaintiff's Third Amended Original Petition. Filed April 13, 1926. F. A. King, Clerk U. S. Court. By J. R. Blades, Deputy.

Amended Answer of Defendant Head.

In the District Court Cooke County, Texas.

No. 9573.

City of Gainesville,

vs.

Southern Construction Company, et al.

Now comes the defendant, H. O. Head, executor of the will of H. W. Head, deceased, and with leave of the court amends its original answer filed on ..... day of ....., 192..., and for answer herein says:

I.

He demurs to plaintiff's first amended original petition because the facts therein alleged show no cause of action against the estate of H. W. Head.

.....

Attorneys for said Defendant.

II.

He demurs specially to said first amended original petition because:

(a) It does not set forth with sufficient particularity and detail the work the Southern Construction Company contracted to do, and the part of said work that was done, and the part that was not done.

(b) Sufficient facts are not alleged to show that the warrants said to have been issued by plaintiff were legal and binding obligations upon it.

(c) Sufficient facts are not alleged to show that the warrants said to have been issued by plaintiff were of any value.

(d) Sufficient facts are not alleged to show that plaintiff is entitled to have any of said warrants or their proceeds delivered to it, instead of to the Southern Construction Company or its assignee.

(e) It is not alleged that said warrants were not turned over to the Southern Construction Company or to its assignee by H. W. Head, by direction or authority of plaintiff.

(f) It does not allege the particular work, if any, plaintiff designated for the Southern Construction Company to do which it failed to do in 180 days.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for said Defendant.

III.

For general answer to said first amended original petition he denies every allegation therein contained and demands strict proof thereof.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for said Defendant.

IV.

For special answer to plaintiff's pleading this defendant says that under the alleged contract between plaintiff and the Southern Construction Company plaintiff was to execute and deliver to said company in payment for the work done thereunder legal and binding warrants and obligations, but this it failed to do, and instead, whatever instruments were delivered or tendered were of no validity whatever. That said instruments instead of being warrants in payment for work actually done, were, if anything, bonds or contracts to

pay for work to be done in the future, and were issued without authority of law, and without compliance with plaintiff's charter for the issuance of either legal bonds or warrants, and said instruments were and are not binding on plaintiff, and were and are of no value whatever, and said Construction Company was not required to do said work and accept said instruments in payment therefor, and cannot be held liable in damages for failure to do any work or furnish any material which it may have failed to do or furnish as alleged. That work actually done and material actually furnished by said construction company was, and is, of value much more than all the warrants or instruments, if any, placed in this defendant's hands under the instruments set forth in plaintiff's pleading. That the alleged contract between plaintiff and the Southern Construction Co. stipulated for the construction of 31,000 square yards of street paving and 10,000 lineal feet of curb and gutter which at the contract price amounted to at least $200,000.00 which was to be paid for in legal street improvement warrants maturing one to twenty years. That under plaintiff's charter and said contract it, plaintiff, was bound and required to pay for all of said paving, curb and gutter with the power, by complying with Articles 999 and 1000 of our Revised Statutes, to reimburse itself by assessing two-thirds of the cost, except at the intersection of streets, against the property fronting on the streets to be improved. The debt incurred by plaintiff to the contractor, Southern Construction Co., however, was for

the full amount, and in attempting to create such indebtedness plaintiff did not comply with that provision of our Constitution which says no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon. In fact the value of the property subject to taxation by plaintiff was not sufficient to authorize it to assess such a rate of taxation, especially in addition to the taxes already assessed which had priority. That if plaintiff made any provision for assessing a tax to meet such interest and sinking fund it was only for a part, to-wit, about $50,000.-00, of the debt for which it so contracted to incur and become liable, so that said entire contract was and is illegal, null and void. That the only authority plaintiff had to issue said warrants or incur a debt for improving its streets was the following provisions of its charter:

"Art. 999—*Power of City Council to Have Streets etc., graded, etc.*—The City Council shall be invested with full power and authority to grade, gravel, repair, pave or otherwise improve any avenue, street, or alley, or any portion thereof, within the limits of said city, whenever, by a vote of two-thirds of the aldermen present, they may deem such improvement for the public interest provided, the city council pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way, shall be paid for by the duty alone; and

said costs shall be assessed on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number; and all moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the cost of said improvement."

"Art. 1000.—*Estimate of Cost of Improvement shall be made, etc.* Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots giving number and size of the same, and the number of the block in which situated and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be any lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown; it shall be the duty of the officer or committee aforesaid to enter on said list opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street, or alley, fronting, adjoining or opposite such lot or fractional lot; and on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall

be a lien upon the property until the payment of the same."

That said charter, and the authority thereby attempted to be conferred, are invalid, null and void both under the constitution of the United States and of this state, in that authority is thereby attempted to be conferred upon plaintiff, one of the interested parties, the right and power to assess upon the property fronting on the street two-thirds of the cost of the improvement, without any notice to the property owner, or opportunity for him to be heard before an impartial tribunal, and without reference to the benefit such property will receive, the effect of which would be to take the owner's property without due process of law. That even if said charter be valid, the requirements thereof in the incurring of said debt and the issuance of said warrants were not complied with in that the particular streets and alleys to be improved were not first determined and designated by a vote of two-thirds of the aldermen present at any meeting as being for the public interest, and by the contract and ordinance providing for the improvement it was not required that plaintiff pay one-third and the owner of the property two-thirds of the cost, except at the intersection of streets, and that at such intersections all costs should be paid for by the plaintiff alone, and said costs should be assessed on the property fronting on the street so improved to be collected in equal annual payments not less than five in number; nor did the city council require an estimate of the probable cost to be made by the

engineer or any other officer of the city, or by a committee of three aldermen, or by any one else, or a report of the lots and blocks and names of the owners as required by the charter. In fact said debt was sought to be incurred and said warrants issued under the Act of 1909 known as the State Paving Law, which had no application to plaintiff inasmuch as it was incorporated under a special act of the legislature as alleged in the petition. That proceeding under said Act of 1909 plaintiff assessed three-fourths instead of two-thirds of the cost against the abutting property owners, and only proposed to pay one-fourth, instead of one-third, itself. That said Act of 1909 is unconstitutional, null and void in that it undertakes to confer upon the city council, one of the interested parties, the right itself to fix and determine the amount each property owner should be assessed and required to pay and to decide whether his property would be benefited that amount; and this without any notice to the property owner or opportunity for him to be heard on whether his property will be so benefited. That said warrants and contract are also wholly void and of no value because Article IV of plaintiff's charter provides that:

"The City Council shall have power and authority by ordinance duly passed, if it so elects, to borrow money on the credit of the city for the permanent improvement of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds, and the City Council may issue bonds

for all or any of the above purposes to any amount not exceeding $150,000 in any one year * * * No bonds shall be issued for any purpose in excess of $2500 unless an election be ordered by the Mayor and City Council and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the City Council to make the issuance of the bonds * * * but if a majority of the votes polled shall be against the creation of such debt, it shall be unlawful for the City Council to issue the bonds * * * No bond shall be issued drawing more than five per cent interest and they shall be invalid if sold for less than par and accrued interest."

Defendant says that this clause of the charter is the only authority given plaintiff for improving the streets on a credit and said warrants are in reality bonds within the meaning and intention of this clause of plaintiff's charter, and calling them warrants is only a thin attempted evasion thereof, and said bonds called warrants were issued by the city council without being authorized by an election as required by said charter and were made to bear six per cent interest instead of five or less.

Said warrants and contract are also void and of no value because by Sec. 6 of Article VII of plaintiff's charter it is provided that: "No ordinance shall be passed finally on the date it is introduced, except in the case of public emergencies," and the ordinance under which said warrants were issued was finally passed on the day it was introduced as appears from plaintiff's petition.

Said warrants and contract are also void and of no value because Sec. 28 of Art. II of plaintiff's charter provides:

"No contract shall be entered into until an appropriation has been made therefor nor in excess of the amount appropriated and all contracts, whenever practicable, shall be made upon specifications, and no contract shall be binding upon the city unless it has been signed by the mayor and the expense thereof charged to the proper appropriation, and whenever the contract charged to any appropriation equals the amount of said appropriation, no further contracts shall be signed by the mayor.

"All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250.00) shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval by the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times."

And no appropriation had been made therefor before said contract was entered into, or at any time, and said contract was not based upon specifications approved by the mayor and city council.

That the contract between plaintiff and the Southern Construction Co. was not based upon, and did not contain, any specifications of the work to be done as required by plaintiff's charter, but only contained a statement of the prices to be charged and paid for whatever material might be furnished and work done thereunder, and required plaintiff to issue legal warrants in payment therefor, but also stipulated that said construction company agreed to accept deferred payments on contracts with property owners in one and two years, and to charge interest on the same at the rate of eight (8) per cent per annum, the effect of which was to bind plaintiff to issue to said company legal warrants for the full amount of material furnished and work done under the contract, including the entire street and intersections less such valid contracts of property owners as it had agreed to accept in payment which plaintiff might deliver to it, and this defendant says that the material furnished and work done by said construction company under said contract at the special instance and request of plaintiff amounted to at least the sum of $150,000.00 and plaintiff only issued to it $47,500 in pretended warrants, but in reality bonds, none of which were valid or legal, and only delivered to it contracts of property owners to the amount of $..... and pretended paving certificates of other property owners none of which were valid, legal or binding obligations. That all money received or collected upon said warrants or bonds or said property owner's contracts

or paving certificates has been credited upon the amount which plaintiff owed said Southern Construction Company for material furnished and work done as aforesaid, and there is still a balance of $..... due it, which said construction company, for a valuable consideration transferred and assigned to said H. W. Head to, in part, compensate him for money he loaned and advanced to it, and which plaintiff refuses to pay though frequently requested to do so.

V.

This defendant says that the term "working days" as used in the alleged contract between plaintiff and the Southern Construction Company only included days on which work of the kind could be properly done, and defendant denies that there were any working days delay as meant in the contract above the 180 days as alleged in plaintiff's pleading. That the term "working days" had by custom in the particular business acquired the meaning here alleged. This defendant especially denies that the Southern Construction Company had become legally indebted to R. C. Caroway Company in any sum whatever, and that plaintiff had any authority to purchase said claim, or has legally acquired such claim if any existed. This defendant further says plaintiff by formal resolutions accepted the work done by the Southern Construction Company in the full amount of the contract, and directed the warrants delivered to it.

VI.

This defendant further says that if plaintiff or those under whom it claims ever had any cause of action against H. W. Head or his estate, or this defendant as executor of his will, by reason of any of the facts alleged in plaintiff's pleading the same accrued more than two years before the filing of plaintiff's amended petition, which was on or about the 10th day of December 1923, and is therefore barred by our statute of limitations.

VII.

This defendant further says that under the contract between plaintiff and the Southern Construction Company the said construction company was to be given by plaintiff approximately 31,000 square yards of street paving and 10,000 lineal feet of curbing and gutter at the prices shown in said amended petition, and said company's bid and contract was based upon the agreement and understanding that it would have that amount of work to do, but instead of plaintiff giving said construction company that amount of work, it only gave them a small part thereof, and although frequently requested refused to give any more work and so notified said company. That the profit which said construction company would have made on the work which plaintiff wrongly refused to give it would have amounted to much more than any warrants, or their value, or proceeds in the hands of said Head or his estate, and this defendant

says that by reason of these facts plaintiff is not entitled to have any warrants, if any, or their proceeds which H. W. Head received under said instruments delivered to it, but said Head was bound to deliver same to the Southern Construction Company, or its assignee, and said construction company and not plaintiff is entitled thereto.

VIII.

This defendant further says that even if it be true that under all the facts as they then existed plaintiff was entitled to have some of said warrants delivered to it instead of to the Southern Construction Company on account of the alleged failure of the construction company to fully comply with its contract, it was also entitled, if it elected to do so, to treat said warrants as having been paid to said construction company, and as its property, and require it to compensate plaintiff in money for the damage it sustained by reason of such failure, and this plaintiff elected to do, and as shown by said amended petition, and as this court judicially knows, plaintiff in this suit elected to claim and sue for said damages instead of for the return of the warrants or their value, or proceeds, and at a former trial recovered a final judgment for the full amount of such damages against said Southern Construction Company, which judgment it still holds, and this defendant says plaintiff is bound by such election, and has no further interest in said warrants or their proceeds, but the same belong to said construction company or to this defendant as its assignee.

IX.

This defendant further says that if it be true, as alleged by plaintiff, that certain warrants were delivered to H. W. Head under the instruments alleged to have been executed by him, and that he in turn had delivered them to the Southern Construction Company or to the Brown-Crummer Company this was after the mayor and city council of plaintiff had from time to time regularly audited the estimates and claims of said Construction Company for material furnished and work and labor done under said contract and by formal resolutions had approved same and ordered said warrants delivered to said Southern Construction Company and this defendant says if said H. W. Head delivered any of said warrants to the said Construction Company it was in accordance with the instruments under which they were placed in his hands, and in obedience to the orders and direction of plaintiff, and if instead of delivering them direct to the said Southern Construction Company he sold them to Brown-Crummer Company this was done by the direction and approval of both plaintiff and the Southern Construction Company and this defendant says that all warrants and their proceeds which ever came to the hands of H. W. Head were by him promptly paid and delivered to said Southern Construction Company and for its benefit, and no part thereof were in his hands at the time of the institution of this suit, or when he first had notice, if ever, that plaintiff claimed it was not entitled to same.

X.

This defendant further says that even if some of said warrants were by H. W. Head, without sufficient authority, delivered to the Southern Construction Company or to Brown-Crummer Company, plaintiff has sustained no injury or damage therefrom because those so improperly delivered were not legal obligations of plaintiff and it cannot be required to pay the same, and they therefore were and are of no value whatever.

XI.

This defendant further says that on the 21st day of January, 1921, plaintiff by its mayor, Hon. J. A. Thomas, wrote a letter to Mr. A. S. Goetz c/o Thurber Brick Company in substance as follows:

"Gainesville, Texas,
1/21/21

Mr. A. S. Goetz,
c/o Thurber Brick Co.,
Forth Worth, Texas.

Dear Sir:

The City of Gainesville, Texas, is to pay for brick to be delivered by you out of the proceeds of certain warrants.

"These warrants have been delivered to Hayden W. Head, Vice-President of the Merchants & Planters National Bank, of Sherman, Texas.

"If convenient to you it would please us to have you continue shipping the brick to the City of Gaines-

ville, but send the invoices for the same to Mr. Hayden W. Head, Sherman, Texas, who will remit for the same as per our contract with you.

"This will save a transfer of this money to us each month and will be agreeable to him as he will indicate to you in a letter to that effect.

Yours very truly,
City of Gainesville, Texas,
By J. A. Thomas, Mayor."

And on the 29th day of January, 1921, H. W. Head wrote a letter to plaintiff's mayor, Hon. J. A. Thomas, in substance as follows:

"Sherman, Texas,
January 29, 1921.

"Mr. J. A. Thomas, (Mayor)
Gainesville, Texas.

Dear Sir:

"I have before me a copy of your letter of the 21st instant to Mr. Arthur S. Goetz, and I beg to advise that I will conform to your wishes and make payment of the invoice of the Thurber Brick Company on the 15th of each month covering shipments made the previous month, for brick and freight on same furnished to the Southern Construction Company.

"I understand that I am to allow the Southern Construction Company credit for such amounts on its account with me against the proceeds of the warrants delivered to me by them.

Yours very truly,
(Signed) H. W. Head."

This defendant is informed and believes and so charges that the amount plaintiff owes the Thurber Brick Company for brick furnished under said letters greatly exceeds any amount of warrants, or their proceeds, or value, in the hands of H. W. Head, or his estate, so that all such warrants and proceeds, if any there be, belong to said Thurber Brick Company and plaintiff has no right thereto.

XII.

This defendant further says that if it be true that plaintiff did designate some work for the Southern Construction Company to do which was not done, such work was upon California and Lindsay Streets, and said Construction Company was, by this court at the instance of the property owners on said streets, in suits to which plaintiff was a party, enjoined from doing said work, and under the alleged contract between plaintiff and said Construction Company was thereby, without fault on its part, prevented and relieved from doing said work and plaintiff failed and refused to designate other work for it to do. However, before said Construction Company was so enjoined it had at the instance and request of plaintiff done a large amount of work on said California and Lindsay Streets in the way of excavating and otherwise which was of the reasonable value of $3600.00 for which plaintiff is liable to it and refuses to pay.

XIII.

This defendant says he denies that H. W. Head was in partnership with Harry D. Levy or Lester Levy or the Southern Construction Company as alleged by plaintiff.

Wherefore, this defendant prays to be discharged with his costs, and for all other relief he may be entitled to receive.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for Defendant, H. O. Head, Executor.

I, H. O. Head do swear that the facts alleged in Section XIII of the foregoing answer are true, and I especially deny that H. W. Head was in a partnership with Harry D. Levy, Lester Levy or Southern Construction Company as alleged by plaintiff.

H. O. Head.

Sworn to and subscribed before me, this the 17 day of May, 1926.

(Seal) F. A. King, Clerk U. S. Dis. Court.
By J. R. Blades, Deputy.

Endorsed:

D. L. No. 241. City of Gainesville vs. Southern Construction Co., et al. Amended answer of defendant Head. Filed May 17, 1926, F. A. King, Clerk, by J. R. Blades, Deputy.

First Amended Answer of Defendant, Brown-Crummer Investment Co.

In the Distrnct Court of the United States for the Eastern District of Texas, at Sherman.

No. 241 *At Law.*

City of Gainesville

vs.

Southern Construction Company, et al.

Now comes Brown-Crummer Investment Company, one of the defendants in the above entitled and numbered cause, and leave of the court being first had and obtained, files this its first amended original answer and respectfully says:

1.

Said defendant demurs generally to plaintiff's third amended original petition and to plaintiff's replications and supplemental pleadings herein and says the same are insufficient in law and show no cause of action against it, of which it prays judgment of the court.

2.

Said defendant denies all and singular the allegations in plaintiff's said third amended original petition and in plaintiff's replications and supplemental pleadings herein contained, and of the same demands strict proof, and of this it puts itself upon the country.

3.

The defendant specially denies that after the sale and delivery to it of the warrants mentioned in plain-

tiff's third amended original petition the contingency arose under which said Southern Construction Company and the defendants, Harry D. and Lester Levy, failed and refused to do the paving work in excess of $34,736.29. This defendant further denies that the real and intended meaning of the obligations referred to in plaintiff's said pleading was to protect and indemnify plaintiff in delivering the warrants to Southern Construction Company before the work mentioned was actually done in the event that said construction company did not do the $50,000.00 worth of work mentioned. This defendant further denies that at the time it purchased the warrants mentioned and received delivery of the same prior thereto, or at any of the times referred to in plaintiff's said pleading, the said Brown-Crummer Investment Company, had or possessed any knowledge of any facts or circumstances referred to in plaintiff's said pleading in anywise affecting the validity of said warrants or the validity or regularity of the proceedings connected with the authorization, issuance or delivery of said warrants or any of them. This defendant further denies that said warrants or any of them were not or are not valid, legal obligations on the part of the city, or that said warrants or any of them are void or unenforceable against the plaintiff city.

4.

This defendant alleges that at all times involved herein, the charter of the City of Gainesville authorized

said city, generally, to contract and be contracted with and said charter provided further that the specifications of particular powers therein should not be construed as a limitation upon the general powers of the city, but that it was the intention of said charter to grant to and bestow upon the inhabitants of the City of Gainesville full powers of self-government and that they should have and exercise all powers of municipal government and they should have and exercise exclusive power and control over the streets, avenues, alleys and highways of the city and to open, alter, widen, extend, establish, grade, pave, macadamize or otherwise improve the same, and to levy taxes for general purposes and to borrow money on the credit of the city for permanent improvements and for the permanent improvement of its streets, avenues and alleys; building of sidewalks, macadamizing, paving and repaving of the streets, alleys and avenues, and to do said things on credit, and, in addition to all other powers, said charter further grants to the city full power and authority to grade, gravel, pave or otherwise improve any street or avenue or any other public highway, whenever by a majority of aldermen present, they deem such improvement for the public interest.

Answering further, if required, this defendant says that on or about November 20, 1919, plaintiff, City of Gainesville, acting by and through its officials thereunto duly authorized, did enter into a contract with Southern Construction Company, whereby the latter agreed to do certain paving work in said city at and

for certain compensation set forth and referred to in said contract, and by supplemental contract, and it was agreed between said parties that said compensation for the labor, material and supervision entering into said paving work should be paid for by said city by certain interest bearing warrants, said warrants to be issued either upon the completion of said contract or upon regularly approved estimates; that on or about December sixteenth, 1919, the governing body of said city, to-wit, the city council, met in regular session and duly and regularly passed an ordinance confirming the contracts above mentioned, and providing for the issuance of warrants as evidence of the city's debt therefor, and setting forth the form in which such warrants were to be prepared and issued, together with interest coupons to be attached to said warrants, and providing for the levy of a tax to pay the interest thereon and creating a sinking fund for their redemption at maturity. A true copy of said ordinance, containing also copies of the contract and supplemental contract above mentioned and containing the form of such warrant and interest coupon, is attached as an exhibit to plaintiff's second amended original petition herein, which said exhibit is here now made a part hereof, the same as if fully and at large set out herein. Said ordinance provided that in payment for said street paving to be done by Southern Construction Company, warrants of the City of Gainesville, to be called "City of Gainesville Street Improvement Warrants, Series No. ....," be issued in the sum of $50,000.00, payable to the said

Southern Construction Company, contractor, their assigns or bearer, evidencing the indebtedness due said contractor by the City of Gainesville under and by virtue of said contracts, and further provided that said warrants should be numbered from one to fifty inclusive, and should be in denominations of one thousand dollars, each, and should be dated November twentieth, 1919, and further set forth the dates of maturity of said respective warrants, and provided that said warrants should bear interest at the date of six per cent per annum from date until paid interest payable March first, 1920, and semi-annually thereafter on the first day of September and on the first day of March of each year, and provided that principal and interest on said warrants should be payable at the offices of this defendant at Wichita, Kansas, and said ordinance further provided that said warrants should be executed and delivered to the said Southern Construction Company, contractor, upon completion of their contract in accordance with the terms and provisions thereof, upon certified statement of account, or upon estimates of materials which have been furnished and labor which has been performed and accepted by said city prior to the date of approval of such estimates, such delivery to be made only after inspection of materials furnished and labor performed under said contract and acceptance of said materials and work by the city council.

5.

At the time of the making of said contracts between the City of Gainesville and Southern Construction Company, and at the time of the passage of said ordinances above mentioned, and at all of the times hereinafter mentioned, said H. W. Head was a partner of Southern Construction Company and was financially interested in said Southern Construction Company, and in the prosecution and completion of the paving work above mentioned by said Southern Construction Company, and in procuring this defendant to purchase, acquire and pay for said warrants with attached coupons, so that thereby Southern Construction Company might acquire the proceeds thereof, and at all of said times, it was known, understood and contemplated by said Head and Southern Construction Company and by said City of Gainesville, that this defendant would purchase, acquire and pay for said warrants as and when issued and delivered by said city, and that this defendant was under contract and agreement so to do, and that said warrants and coupons were to be and in fact they were, payable to Southern Construction Company or bearer, and when issued would be sold and would pass from hand to hand for value in the market; that Southern Construction Company proceeded with the performance of said contracts for said paving work and from time to time, to-wit, on or about April sixth, 1920, on or about September twenty-first, 1920, on or about October fifth, 1920, on or about November second, 1920, and on or about November

sixteenth, 1920, estimates of materials which had been furnished and labor which had been performed and accepted by said city prior to the date of approval of such estimates and after inspection of such material furnished and labor performed and acceptance thereof by the city council of said city, were by said city council approved, and on or about each of said dates the city council of said city in regular session and with a quorum present, duly and regularly passed a resolution auditing and allowing said respective estimates and recited in said resolution that the materials furnished and the work performed and covered by said respective estimates had been by the city council inspected and accepted by it to be in accordance with said contracts for paving and the plans and specifications therefor, and that it had been determined by said council that said materials and work were well worth the price as agreed to be paid therefor and as reflected in said estimates, and that said estimates had been duly audited and found to be correct, and each of said resolutions thereupon directed and stipulated that warrants representing the amount of said respective estimate should be delivered to said Southern Construction Company in the form and according to the tenor hereinabove mentioned, and said resolution in each instance further recited that the City of Gainesville had received full value and consideration for the warrant therein authorized to be delivered, and on each of said occasions the mayor and each of the aldermen of said city did sign and swear to an affidavit on oath

stating that the statements contained in said respective resolutions approving said respective estimates were true and correct and that the materials so furnished and the work performed and covered by said respective estimates had been by said council inspected and accepted, and found to be in accordance with said contract and plans and specifications, and had been determined by said council to be well worth the price agreed to be paid therefor, as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants; that the warrants authorized and ordered to be issued and delivered under the resolution of April sixth, 1920, above mentioned were: Warrants numbers 1 to 3, inclusive, each in the denomination of $1,000.00 with interest coupons attached; that the warrants authorized and directed to be issued and delivered by the resolution of date September twenty first, 1920, above mentioned, were warrants numbers 41 to 50, inclusive, each in the denomination of $1,000.00 with interest coupons attached; that the warrants authorized and directed to be issued and delivered by the resolution of date October fifth, 1920, above mentioned, were warrants numbers 24 to 40, inclusive, each in the denomination of $1,000.00 with interest coupons attached; that the warrants authorized and directed to be issued and delivered by the resolution of date November second, 1920, above mentioned, were warrants numbers 12 to 23, inclusive, each in the denomination of $1,000.00, with interest coupons

attached; that the warrants authorized and directed to be issued and delivered by resolution of date November 16, 1920, above mentioned, were warrants numbers 4 to 13, inclusive, each in the denomination of $1,000.00, with interest coupons attached; that each of said warrants was substantially in terms and language as follows:

No. .... United States of America $1000.00

State of Texas, County of Cook.

City of Gainesville

Street Improvement Warrant,

Series .....

This is to certify that the City of Gainesville, County of Cook, and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March 19.., at the offices of The Brown-Crummer Investment Company, Wichita Kansas, the sum of one thousand dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the city treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto,

principal and interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This warrant is one of a series of fifty (50) warrants, numbered consecutively from one (1) to fifty (50), inclusive, in the denomination of one thousand ($1,000.00) dollars, each, aggregating the sum of fifty thousand ($50,000.00) dollars; issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the constitution and laws of the State of Texas and pursuant to an ordinance passed by the city council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at pages 570, *et seq.*, of the minutes of said city council.

The date of this warrant, in conformity with the ordinance above mentioned is November 20th, 1919.

And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said city, including this warrant, does not exceed any constitutional or statutory limitation.

In witness whereof, the City of Gainesville has caused the corporate seal of said city to be hereto affixed and this warrant to be signed by its mayor, and countersigned by its city secretary, and registered by the city treasurer, as of the date last above written.

(Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Countersigned:
City Secretary, City of Gainesville, Texas.
(Seal) Registered this the .... day of .... 1919.
(Signed) W. H. Garmany,
City Treasurer, City of
Gainesville, Texas.

that the interest coupons attached to said warrants were in terms and language substantially as follows:

No. $30.00

On the 1st day of
March 1920.

the city treasurer of the City of Gainesville, Texas, will pay to The Southern Construction Company, their assigns or bearer, at the offices of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of thirty ($30.00) dollars, the same being six months interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ...., No. ...., dated November 20th, 1919, to which this coupon is attached and is a part thereof.

(Signed) E. N. Blackburn.

.....
City Secretary.

that each of said warrants recited that it was issued for the purpose of evidencing a valid indebtedness of the City of Gainesville to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements therein mentioned, being the identical street improvements herein referred to, under and by virtue of the constitution and laws of the State of Texas and pursuant to the ordinance passed by the city council of said City of Gainesville, of date December second, 1919, hereinabove referred to, and each of said warrants further certified and recited that all acts, conditions and things required to be done, precedent to and in the issuance of said warrant had been properly done, happened and performed and in regular and in due time, form and manner as required by law, and that the total indebtedness of said city, including said warrant did not exceed any constitutional or statutory limitation; that following the passage of each of said resolutions said City of Gainesville, H. W. Head and Southern Construction Company prepared and presented to this defendant from time to time the said warrants with interest coupons thereto attached, together with certified copies of the ordinances and resolutions above mentioned and originals of the affidavits above mentioned, and also full and complete certified transcripts of the proceedings of the city council of the said City of Gainesville, purporting to show and showing the regularity of its actions in the issuance of said warrants, which transcript contained certified copies of the ordinances and resolutions au-

thorizing the issuance of said warrants, and contained certified copies of the resolutions and orders above mentioned, auditing, approving and allowing the estimates above mentioned and certifying said estimates to be true and correct, and that the materials had been furnished and the work performed by said Southern Construction Company representing said warrants and said transcript contained affidavit certifying to the genuineness of the signatures of the city officials, required by the city charter to sign and execute said warrants, and that every condition and requirement precedent to the issuance of legal and binding warrants had been complied with; that all of said proceedings were had and acts done and caused to be done by said parties and each of them with the purpose and intention of causing and inducing this defendant to believe and rely upon the truth of the recitals and representations contained in said ordinances, resolutions, warrants, affidavits and proceedings and for the purpose of inducing and causing this defendant to purchase and pay for said warrants with interest coupons attached, and with the purpose of rendering said warrants and coupons salable and merchantable on the market, all of said parties knowing and contemplating, as hereinbefore stated, that said warrants and coupons according to their tenor, were payable to Southern Construction Company or bearer and would in all probability pass and be sold from hand to hand in the market, after being acquired by this defendant; that believing and relying upon the truth of said representations and recitations

and each and all of them, this defendant did purchase and pay for all of said warrants with interest coupons attached without any notice of any infirmity in any of said warrants or coupons, and thereupon it acquired the legal and equitable ownership of same; that thereafterwards, this defendant, as said parties at all times contemplated it would do, did sell all of said warrants and coupons to numerous persons and customers who likewise bought and paid value for same, believing and relying upon the truth of said representations and recitations and without knowledge of any infirmity in any of said warrants or coupons; that thereafterwards, this defendant re-acquired from the purchasers thereof warrants numbers 7 and 8, due March first, 1924, each in the principal sum of $1,000.00 and warrants numbers 9 and 10 and 11 and 12, due March first 1925, each in the principal sum of $1,000.00, and interest coupons due March first, 1924, aggregating the principal sum of $1320.00, and interest coupons due September first, 1924, aggregating the principal amount of $1260.00, and interest coupons due March first, 1925, aggregating the principal amount of $1260.00, and interest coupons due Sept. 1, 1925, aggregating $1200.00 and interest coupons due March 1, 1926, aggregating $1200.00, an itemized list of which warrants and coupons is hereto attached and marked Exhibit "A" and made a part hereof for more particular description and identification, and acquired from said purchasers all of their respective claims and causes of action against the City of Gainesville, that thereby this defendant again became and

still is the legal and equitable owner of said warrants and coupons listed in said Exhibit "A" and of the causes of action aforesaid; that this defendant was not at the time that plaintiff filed its second amended original petition herein and is not now the owner of any of said warrants and coupons herein mentioned, except those identified in said Exhibit "A"; that said warrants and interest coupons mentioned in Exhibit "A" constitute a valid and subsisting indebtedness of the City of Gainesville now past due and payable and said City of Gainesville has failed and refused, and though often requested to do so, still fails and refuses to pay the same or any part thereof to this defendant's damage in the sum of fifteen thousand ($15,000.00) dollars, with interest at the rate of six per cent per annum from the maturity date of each of said warrants and interest coupons mentioned in Exhibit "A" until paid.

6.

This defendant alleges further that the recitations and representations above mentioned and set forth in the ordinances, resolutions, affidavits, proceedings and warrants above named, were and are true, but if mistaken as to the truth of any of them, this defendant alleges that by virtue of the facts herein set out said City of Gainesville, H. W. Head, Southern Construction Company and each of them are estopped and precluded against this defendant from alleging or asserting that any of said representations or recitations

were or are untrue. This defendant alleges further that its co-defendant herein, H. O. Head, executor of the estate of H. W. Head, deceased, is estopped and precluded to set up any alleged infirmity or irregularity in any of said warrants or coupons as against this defendant, for the said H. W. Head, deceased, did, in order to cause and induce this defendant to purchase and pay for said warrants and coupons, he being financially interested in procuring and causing this defendant to do so, represent to this defendant that all necessary proceedings and requirements precedent to the legal issuance and delivery of said warrants and coupons had been had and done in accordance with law, and that the materials had been furnished and work performed represented by said warrants as set forth in the ordinances, resolutions and affidavits above mentioned, and did represent to this defendant that said ordinances, resolutions, affidavits and proceedings above mentioned were genuine and reflected the true facts, and this defendant in purchasing and requiring said warrants and coupons did believe and rely upon said representations as he purposed and intended it should do, and this estoppel is especially plead herein against said H. O. Head, as executor of the estate of said H. W. Head, deceased, and the attempt of said co-defendant, H. O. Head, executor, to question or challenge the validity or enforcibility of any of said warrants or coupons herein is an unwarranted and collateral attack on said warrants and coupons, which he can not be heard to make herein.

7.

That any and all payments heretofore made by the City of Gainesville to this defendant on the principal and interest of said warrants were made to it as agent only and such funds were paid by it as such agent to the then owner and holder of said warrants and interest coupons who presented same at the office of this defendant for payment, at which office said warrants and interest coupons are by their terms payable; that this defendant had and has no other or further interest in said warrants or coupons on which such payments have heretofore been made than to submit same to the City of Gainesville for payment and to receive payment from the city in behalf of the then owners and holders thereof, which it did and promptly transmitted the amounts collected to said owners and holders; that all of the payments heretofore made by said City of Gainesville were voluntarily made by it and with full knowledge of all of the facts and circumstances connected with the authorization, issuance and delivery of said warrants and coupons.

8.

This defendant alleges further that plaintiff has heretofore paid off a number of the warrants and coupons by it issued and delivered as aforesaid and also by its pleadings in this cause from time to time has elected to treat all of the warrants and coupons mentioned, issued and delivered by it as valid and binding obligations of said plaintiff city and has elected to sue for the damages it has suffered by reason of the

alleged failure of defendant, Southern Construction Company, to complete said paving work and by reason of the alleged breach by H. W. Head and his executor of the indemnity agreement signed by H. W. Head and surety bonds signed by Southern Surety Company set forth in plaintiff's pleadings herein; that on or about December tenth, 1923, plaintiff filed herein its first amended original petition wherein are set forth and contained substantially the identical allegations as are now set forth in its second amended original petition, which said first amended original petition of plaintiff is here now referred to and made a part hereof, the same as if fully and at large set out herein for the purpose of disclosing the allegations therein contained.

9.

This defendant adopts and makes a part hereof the allegations contained in paragraphs VII, VIII, IX and XII of the first amended original answer herein of H. O. Head, executor of the estate of H. W. Head, deceased.

Premises considered, this defendant prays that plaintiff be denied any relief herein against it and that this defendant have judgment against plaintiff city for the causes of action above set forth and upon the warrants and coupons set forth in its Exhibit "A" hereto

attached, principal, interest and costs and for such other and further relief, general and special, as to the court may seem proper.

ELCOCK & MARTIN,
THOMPSON, KNIGHT, BAKER & HAINES,
Counsel for Defendant Brown-Crummer Investment Company.

Endorsed:

D. L. No. 241. Defts First Amended Original Answer. Brown-Crummer Investment Co. Filed May 17, 1926 F. A. King, Clerk. By J. R. Blades, Deputy.

EXHIBIT "A."

Warrant No. 7, due March 1, 1924	$1 000 00
Warrant No. 8, due March 1, 1924	1 000 00
Coupon No. 9, detached from warrants Nos. 7 to 50, 44 at $30 00 each, due March 1, 1924.	1 320 00
Coupon No. 10, detached from warrants Nos. 9 to 50, 42 at $30 00, each, due September 1, 1924.	1 260 00
Coupon No. 11, detached from warrants Nos. 9 to 50, 42 at $30.00 each, due March 1, 1925	1 260 00
Warrant No. 9, due March 1, 1925	1 000 00
Warrant No. 10, due March 1, 1925	1 000 00
Warrants 11 and 12 due March 1, 1925	2 000 00
Coupon No. 12, detached from warrants Nos. 11 to 50, 40 at $30 00 each, due September 1, 1925.	1 200 00

Coupon No. 13, detached from warrants Nos. 11 to 50, 40 at $30 00 each, due March 1, 1926. . . . . 1 200 00

Second Amended Original Answer of Defendant, Southern Surety Co.

In the District Court of the United States,

Eastern District of Texas, Sherman, Texas.
City of Gainesville,

vs.

Southern Construction Company et al.

Now comes Southern Surety Company, one of the defendants herein, and on leave of court amends its original answer and its first amended original answer heretofore filed in this cause, and files this, its second amended original answer for and in lieu of all other pleadings by it filed herein, and for same says:

Defendant demurs generally to the plaintiff's third amended original petition and says that same is insufficient to require this defendant to answer further of which it prays the judgment of the court.

For its first special exception to plaintiff's said third amended original petition, this defendant says that there is pleaded and set forth by the plaintiff as a basis for this cause of action against this defendant two alleged obligations executed by this defendant as surety for H. W. Head, payable to the City of Gainesville, Texas, and being conditioned in respect to any dispute, discrepancy or other contingency which might arise which might in any way affect the amount of

work done or materials furnished by Southern Construction Company so as to in any way affect certain warrants delivered to one H. W. Head, and plaintiff further pleads that there did arise a dispute, discrepancy and contingency which did affect the amount of work done and material furnished so as to affect said warrants and that said matters did affect said warrants but plaintiff nowhere in said pleading sets up how or in what manner said warrants were affected, and how or in what manner said dispute, discrepancy or contingency did affect said warrants nor what such effect was and said pleading is wholly insufficient to apprise this defendant of what it will be called on to answer. The allegations that there did arise a dispute, discrepancy or contingency which affected the amount of work so done or material furnished so as to affect said warrants alleged to have been delivered, is a mere legal conclusion and statement.

Defendant further specifically adopts the special exceptions of its co-defendant, H. O. Head, executor of the will of H. W. Head, deceased, as though said exceptions were here copied at length.

Answering, if answer be required, this defendant denies each and every allegation in said plaintiff's third amended original petition and demands strict proof thereof.

This defendant respectfully shows to the court that its liability herein, if any, is that of surety only as disclosed by the plaintiff's pleading and it here specifically adopts all the special answers of its co-

defendant, H. O. Head, executor, as aforesaid. This defendant further specifically adopts the pleading and answer of the plaintiff, the City of Gainesville, insofar as said answer assails the legality of the warrants involved, but not otherwise.

For its first special and separate answer, this defendant denies that the document referred to in paragraph 9 of plaintiff's said third amended original petition was intended to bear date of October 20th, 1920, or that the reference to the obligation of H. W. Head of September 10, 1920, was intended to be October 4th, 1920, and says that in truth and in fact this defendant intended to execute and did execute such document as the same is written and dated and not otherwise.

For its second special and separate answer, this defendant says that if, in truth and in fact, the Southern Construction Company became indebted to the city for water furnished, truck rental, engineering fees, or other items of any and every kind whatsoever, as alleged in plaintiff's third amended original petition, this defendant says that it never assumed and never had any liability to plaintiff in respect to such items and is not now liable therefor.

For its third special and separate answer, this defendant says that if it be true as alleged by plaintiff, that H. W. Head was a member of the partnership doing business under the name of the Southern Construction Company, this defendant had no knowledge of such fact and is in no wise responsible for any

liability that might be alleged or established against the said Head by virtue of said partnership.

For its fourth special and separate answer to plaintiff's third amended original petition and particularly with respect to the matters alleged in paragraph 19 of said petition, this defendant says that if, in fact, there was made between plaintiff, H. W. Head and the Southern Construction Company any agreement with respect to the rights of said parties, it was in no wise a party thereto and had no notice or knowledge of same and was in no wise bound thereby. That if this defendant's principal, H. W. Head, assumed or admitted a liability to the plaintiff, then that such assumption was a new and independent undertaking and agreement on the part of the said H. W. Head and the said Southern Construction Company. That if, in fact, such transaction did occur, it was entered into long after the execution of any of the obligations alleged to have been executed by this defendant and this defendant in no wise participated in same and had no knowledge of same and said liability, if any was created or admitted as alleged, was not and is not covered by the terms of any of the obligations of this defendant and was a new and independent contract between the parties and for which this defendant was not and is not liable. This defendant specially denies that the said H. W. Head was attorney for the Southern Surety Company, this defendant, and denies that he had any authority to act for this defendant and this defendant says, in truth and in fact, that said H. W. Head was

never attorney for this defendant and was never clothed with and never had any authority to act for it or to bind or attempt to bind it by the terms of any alleged agreement claimed to have been made with the said plaintiff as set out in said paragraph 19 of its said third amended original petition.

For its fifth special and separate answer and prayer for permanent relief, this defendant says that if it be held liable herein for any amount, then that such liability exists solely by reason of its suretyship for H. W. Head as disclosed by the entire record herein and if any liability be adjudged against this defendant, it prays that it have judgment over against its co-defendant, H. A. Head, as executor of the estate of H. W. Head, deceased, for the amount of said liability so adjudged.

Premises considered, this defendant prays that plaintiff take nothing by its suit herein and it prays for such relief general and special in law or in equity that it may in this behalf deserve.

Jno. T. Suggs,
Attorney for Defendant,
Southern Surety Company.

Endorsed:

No. 241. City of Gainesville vs. Southern Const. Co. et al. Second Amended Original Answer of Deft. Southern Surety Co. Filed May 17, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

Plaintiff's First Amended Supplemenal Petition.

In the District Court of the United States for the Eastern District of Texas

Sherman Division.

No. ....

City of Gainesville, Plaintiff,

vs.

Southern Construction Company, et al., Defendants.

Now comes the plaintiff and with leave of the court amends its replications and supplemental petitions to the answer of any one or more of the defendants heretofore filed so as to read as follows:

1.

The plaintiff denies each and every allegation in the answers of each and all of the defendants except where hereinafter expressly admitted.

For further reply to said answers, the plaintiff says:

1.

The Southern Construction Company, hereafter called the contractor, had no valid contract with the plaintiff for the paving of any of its streets.

By Section 28, Article 2 of Plaintiff's Charter, it is prescribed that no contract shall be let for paving or other public improvement involving an outlay of as much as $250.00 unless based upon specifications prepared, submitted to and approved by plaintiff's mayor and city council, and pursuant to competitive bidding

advertised for as therein directed, nor could any except sealed bids be received and after being received they were required to be opened by the mayor in the presence of the council and to remain on file in his office open to public inspection for at least forty-eight hours before any award be made to any competitive bidder. In disregard of this provision of the charter, the plaintiff's council awarded the contract in question to the Southern Construction Company within less than twenty-five hours after the bids were opened.

2.

The specifications, as well as instructions to bidders, prescribed that the successful bidder should furnish a bond in the amount of his bid with good and sufficient sureties satisfactory to the plaintiff's council. In their bids for the proposed work, the said contractor, as well as the other bidders, bound itself on the acceptance of the bid to execute a contract and bond for performance and completion of the proposed work, and to pay for the work and material entering therein, and to keep the same in a state of repair for a period of five years from its acceptance by the plaintiff. By the specifications and instructions to bidders, the abutting lot owner was required to pay for curbs and gutters and three-fourths of the paving between street intersections, while the plaintiff was required to pay for the street intersections and one-fourth of the remaining cost according to the front foot plan or rule. By such specifications and instructions, the contractor or successful bidder was required to execute to the

plaintiff its bond with good and sufficient sureties in the sum of twenty-five per cent of the entire cost, conditioned that the contractor would well and truly keep such improvements in good repair, reasonable wear and tear excepted, for a period of five years.

The above provisions contained in the instructions to bidders, as well as in the specifications increased the cost of the work and necessarily influenced those seeking the contract to bid higher than they otherwise would, notwithstanding which, plaintiff's council within less than twenty-five hours after the opening of the bids, awarded the contract to the Southern Construction Company leaving off the maintenance bond, the construction bond and the bond exacted by the statute for the payment of the work and material entering into the construction of the improvement. But in lieu of said bonds, it was agreed that the Southern Construction Company should pledge to the city collateral securities aggregating $5000.00, but soon thereafter in lieu of the proposed collateral, the contractor executed a bond in the sum of $5000.00, conditioned to perform the contract and to pay for the work and material used in completing it. The contractor give no other or different bond. The bonds given and the obligation to maintain the work for five years, rendered the contract more burdensome and influenced the minds of competitive bidders in bidding for the work and were material provisions. After determining to leave off the bonds and the obligation for maintenance, the city let the modified contract to the Southern Construction Com-

pany without readvertising for bids and without inviting competitive bidding, and the contract as finally made is and was null and void because let without competitive bidding in violation of the charter.

3.

Warrants 1, 2 and 3 issued pursuant to the resolution of September 7th, 1920, and constituting a part of the fifty warrants mentioned in the pleadings, were for tarvia paving and have been paid, and also warrants 4, 5, and 6 issued under the resolution of November 16th, 1920, leaving forty-four of said warrants yet unpaid.

At the time of the issuance of said forty-four warrants, no paving had been done under said contract except some tarvia paving, which had been accepted by plaintiff's council and paid for, the city's part of which amounted to only $3000.00. The contractor being without credit and endeavoring to do paving work without bond to pay for the work and material used in its construction, was unable to purchase material or to secure labor. In advance of the performance of the work or its acceptance but in pursuance of a scheme devised by the Brown-Crummer Investment Co., hereafter called the Investment Co., to evade the law, said Investment Co. prepared resolution for the issuance of such warrants falsely reciting that the work had been done and had been inspected and accepted, when no work had been done, no inspection had been made and no acceptance had, for material not bought and work not done could not be inspected or accepted. The re-

citals in said pretended resolution were untrue and known to be untrue by said Investment Co. and all connected therewith. While said resolutions were passed and said warrants issued during the fall of 1920, no work was done until the spring and summer of the following year. The total paving done by the Southern Construction Company under its contract with the plaintiff including the tarvia paving, amounted to the sum of $34735.29, leaving $15264.71 represented by said warrants for which the plaintiff received no consideration. All of said warrants are illegal and void, because issued, not to evidence any debt owing from the plaintiff to the contractor, but were issued at a time when the plaintiff was not indebted to the Southern Construction Company to any amount, but upon the expectation that the contractor would thereafter do paving under its contract to the amount of said warrants, but the contractor failed to place paving the city's part of which amounted to said warrants, but lacked $15264.71 of so doing under the contract the city's part was to be paid for as the work progressed after inspection and acceptance, the city retaining 10% until full performance.

4.

Under Article 4 of plaintiff's charter, it is provided that no bonds shall be issued for any purpose in excess of $2500.00 unless an election be ordered by the mayor and city council and at such election the majority of the votes should be in favor of creating such

debt. In said section, the council is given authority by ordinance duly passed to borrow money on credit of the city for the permanent improvement of its streets, avenues and alleys, and may issue bonds for that purpose, but subject to the limitation that if the proposed bond issue should exceed $2500.00 the same must be submitted to the voters of the city. While said pretended warrants are warrants in name, they are bonds in form and in substance, and are a subterfuge to evade the provision of the charter against the issuance of bonds in excess of $2500.00 unless authorized by a vote of the people. Said Investment Co. not only knew at all times that said warrants were issued unlawfully and without any consideration, but said Investment Co.'s agents were travelling through Texas posing as experts possessing the skill to teach mayors and aldermen how to adroitly evade the constitution, the statute and the charter in creation of debt.

Said pretended warrants are not negotiable paper under the law merchant, and no one could acquire the same otherwise than subject to any defense the plaintiff may have thereto.

5.

The supplemental contract mentioned in the answer of the Investment Co., as well as the ordinance of ratification, evidence a contract materially different from that bid on and show a contract let without competitive bidding and are void. The ordinance of ratification as well as that authorizing the original contract were passed upon the day introduced in disregard of Section

19, Article 9 of the Charter, prescribing that all ordinances passed by the council shall be read upon three several days, and in disregard of Section 6, Article 7 of the Charter saying that no ordinance shall be passed finally on the day it was introduced, and in disregard of Section 19, Article 9, and Section 6, Article 7 prescribing that the above rules cannot be suspended except by a majority of a full board, and in disregard of that provision of Section 6, Article 7 saying, "The ayes and nays shall be taken upon the passage of all ordinances and resolutions and entered upon the journal of its proceedings." The rules were suspended, if at all, in reference to said ordinances without a roll call and without an aye and nay vote being taken or entered on the journal.

6.

Section 29 of Article 2 of Plaintiff's Charter requires a good and sufficient bond of all contractors with at least two good and sufficient sureties thereon. The contract in question called for an expenditure of approximately $200,000.00 including the amount coming from abutting lot owners, while the only bond given was in the sum of $5000.00, which was grossly insufficient and known to be such at the time by all parties concerned and was a mere subterfuge to evade the charter requirements.

7.

The allegations in the answer of defendant Head in reference to the provisions of plaintiff's charter con-

cerning the permanent improvement of streets and the manner of paying therefor are substantially true and are adopted by the plaintiff with this qualification. During the month of October, 1919, there was an attempt to amend plaintiff's charter by adopting Title 11, Chapter 22 of the Revised Statutes of 1911, known as the State Paving Law, but at the election held for that purpose, the question was submitted not to the qualified voters of the city, but only to such of them as were property taxpayers, in disregard of Section 5, Article 11 of the Texas Constitution, known as the home rule amendment, requiring proposals to adopt or amend, a charter be submitted to the qualified voters of the city at an election to be held for that purpose. Said attempt to make said State Paving Law part of the charter was ineffectual for many other reasons, but had said paving law been lawfully adopted, it conflicts with the provisions of the plaintiff's charter in reference to paving quoted in the answer of defendant Head, and to the extent of the conflict is inapplicable. The contract in question requires that the abutting lot owners pay for three-fourths of the paving between street intersections while the charter requires that they pay only two-thirds. The contract in question requires the abutting lot owners to pay for their prorata of the cost in three equal installments, one on demand after acceptance of the work, and the others in one and two years, while the charter prescribes that the amount assessed against the abutting lot owners shall be collected in equal annual installments not less

than five in number. The above paving contract and all proceedings thereunder for the above as well as for many other reasons are and has ever been void.

7a.

The contract in question, as well as the specifications and instructions to bidders, in disregard of that provision of the charter for the letting of contracts to the lowest responsible bidder, required the contractor in the construction of the improvement to give preference in employment to the citizens of the city and where they were not available, to citizens of the State of Texas, which provisions were taken into consideration by those bidding for the work and caused them to bid higher than they otherwise would, thereby rendering said contract void.

8.

The facts alleged in this supplemental petition the plaintiff is ready to verify, but the validity or invalidity of the contract and warrants in question is for the decision of the court. In case said warrants are held to be invalid, the plaintiff prays for judgment so declaring, but in case they are held to be binding and enforceable, the plaintiff prays judgment against defendant Head and the Southern Construction Company for the amount of the warrants for which it received no consideration, with interest at six per cent per annum from the date of the filing of this suit, and for

such other relief against the defendant Head and said Surety Co. as it may be entitled to in the premises.

CECIL MURPHY,
W. O. DAVIS,
Attorneys for Plaintiff.

The State of Texas, County of Cooke.

I, J. Z. Keel, on oath say that I am Mayor of the City of Gainesville, and that the allegations contained in the foregoing amended supplemental petition are true.

J. Z. Keel.

Sworn to and subscribed before me, this the 12th day of May, 1926.

Georgia Fisher,
Notary Public for Cooke County, Texas.
(Seal)

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Plaintiff's First Amended Supplemental Petition. Filed May 17, 1926 F. A. King Clerk. By J. R. Blades, Deputy.

Third Supplemental Answer of Defendant, Head.

In District Court of U. S. for Eastern District of Texas at Sherman.

City of Gainesville,

vs.

Southern Construction Co. et al.

Now comes defendant, H. O. Head, executor, and, with leave of the court files this supplemental answer,

and in reply to plaintiff's third amended petition filed .... day of ...., 1926, and to plaintiff's supplemental petition filed .... day of ...., 1926, and to defendant, Brown-Crummer Investment Company's amended answer filed .... day of ...., 1926, and to all pleadings filed by plaintiff and said defendant, Brown-Crummer Investment Company, and says:

I.

He adopts all demurrers, and reaffirms all allegations contained in his amended answer filed before the removal of this case from the State Court to this court, and he also adopts all the allegations contained in plaintiff's said supplemental petition which challenge, or call in question, the validity of said alleged warrants.

II.

This defendant denies all allegations contained in plaintiff's said third amended petition which are not expressly admitted in his pleading herein filed, and says he especially denies that H. W. Head ever promised or agreed to pay plaintiff any part of any debt or obligation which either the Southern Construction Company, or Harry D. Levy or Lester Levy owed to it, and says if any such promise or agreement was ever made it was without consideration, was not in writing but was only verbal, was made more than two and more than four years before the institution of any suit thereon by plaintiff, was never legally binding upon said H. W. Head and plaintiff's cause of action thereof, if any it ever had, is barred by our statutes of limitation of two and four years.

III.

This defendant denies that H. W. Head was a partner in the Southern Construction Company, or with either Harry D. Levy or Lester Levy.

I, H. O. Head, one of the defendants as executor of H. W. Head's will, do swear that the facts set forth in Section III of the foregoing supplemental answer wherein it is denied that H. W. Head was a partner in the Southern Construction Company, or with Harry D. Levy or Lester Levy, are true.

H. O. Head.

Sworn to and subscribed before me this 6th day of May, A. D. 1926.

Marguerite Reeves,
Notary Public in and for Grayson County, Texas.

(Seal)

IV.

This defendant says that even if it be held that the Act of May 10, 1909, known as the General Paving Law, was applicable to the City of Gainesville the alleged warrants are and were invalid, null and void, for that by Sections 3 and 4 of said act it is provided:

"That the governing body of any city shall have the power to order the improvement of any highway therein, or part thereof, and to select the materials and methods for such improvement, and to contract for the construction of such improvements in the name of the city, and to provide for the payment of the cost of such improvements out of any available funds of the city or as herein provided.

That the cost of making such improvements may be wholly paid by the city, or partly by the city and partly by owners of property abutting thereon; provided, that in no event shall more than three-fourths of the cost of any improvement, except sidewalks and curbs, be assessed against such property owners or their property; but the whole cost of construction of sidewalks and curbs in front of any property may be assessed against the owner thereof or his property."

And this defendant says that the governing body of said city did not, before it entered into the alleged contract with the Southern Construction Company, order the improvement of any of the highways or streets therein, and select the materials and methods for such improvement, and especially did not before entering into said contract designate the particular highways or streets that were to be included in said contract, but on the contrary, said contract only applied to the prices to be paid for such work as might be done upon any highways or streets as might thereafter be designated, and all work that was done thereunder was upon streets that were designated by the city from time to time long after the contract fixing prices was entered into, and long after whatever instruments called warrants that were executed by the city had been executed by it.

Defendant further says that by the said General Paving Law the city was not empowered to contract to pay for the improvement of its streets by the issuance of time warrants or obligations of the kind in question,

but was only authorized, "to provide for the payment of the cost of such improvements out of any available funds of the city or as provided herein," the term "as provided herein" having reference to special assessments against benefited property owners.

Wherefore this defendant prays that he be dismissed with his costs, and for general relief.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for Defendant Head.

Endorsed:

No. 241 In District Court of U. S. Eastern District of Texas, at Sherman. City of Gainesville, vs. Southern Construction Co. et al. Defendant's Supplemental Third Answer. Filed May 17, 1926 F. A. King Clerk By J. R. Blades, Deputy.

Agreement and Stipulation of Parties.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. 241 *Law.*

City of Gainesville,

vs.

Southern Construction Co. et al.

It is admitted and stipulated by the parties as follows:

1.

This suit was brought in the District Court for Cooke County, Texas, on October 11th, 1921, by the City of Gainesville (a Texas municipal corporation) against the Southern Construction Co. (a partnership composed

of Lester Levy and Harry D. Levy), the Southern Surety Co. (an Iowa corporation), and H. W. Head (a citizen of Texas residing in Grayson County).

Default judgment in said cause was rendered by said court in favor of the plaintiff against all defendants for $15000.00 and against the Southern Construction Co. for $4090.00, which judgment upon appeal by said Head and said Southern Surety Co. was reversed by the Court of Civil Appeals for the Sixth Supreme Judicial District as to said Head and said Southern Surety Co., but was affirmed as to said Southern Construction Co. See *Head* v. *City of Gainesville*, 254 S. W. 323. Upon the remand of said cause to the District Court for Cooke County, H. O. Head, as executor, made himself a party in lieu of H. W. Head who had died in the meantime and he and the Southern Surety Co. filed an answer to the petition. Thereupon, the plaintiff amended its petition making Brown-Crummer Investment Co. a Kansas corporation a party defendant, and said Brown-Crummer Investment Co. within the time allowed by law filed its petition to remove said cause to this court upon the ground of a separable controversy. After a transcript of the proceedings were filed in this court, a motion to remand made by the plaintiff was overruled. All parties having repleaded in this court with the exception of the Southern Construction Co. which did not appear, it is agreed that the transcript of the proceedings in the district court as well as all abandoned pleadings may be omitted by the clerk in making out the record for the circuit court of appeals, as immaterial.

2.

The plaintiff contemplates carrying this cause to the circuit court of appeals for the fifth circuit by writ of error, and the parties in case a writ of error is allowed and citation issue, waive the service of citation and acknowledge full and complete notice of said proceedings.

This June 3rd, 1926.

CECIL MURPHY,
W. O. DAVIS,
Attorneys for Plaintiff, the City of Gainesville.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for H. O. Head, Executor.

JNO. T. SUGGS,
Attorney for Defendant, Southern Surety Co.

THOMPSON, KNIGHT, BAKER & HAINES,
Attorneys for Defendant, Brown-Crummer Investment Co.

It is further stipulated by plaintiff and Brown-Crummer Investment Company that upon the remand of this cause from the Court of Civil Appeals to the District Court of Cook County, Texas, the defendant Head answered, alleging that the warrants in question were illegally issued, void, and of no value, and thereafter, on December 10, 1923, the plaintiff filed its first amended original petition, making Brown-Crummer Investment Company a defendant, and alleging that the warrants constituted valid, legal and binding promises and obligations of the plaintiff; and the plaintiff further pleaded,

in the alternative, that if it be true that said warrants were not valid, which the plaintiff denied, and the court should hold that said warrants are void, then the plaintiff, in said pleading, prayed that the warrants be cancelled and declared void.

CECIL MURPHY,
W. O. DAVIS,
Attorneys for Plaintiff, the City of Gainesville.
THOMPSON, KNIGHT, BAKER & HAINES,
Attorneys for Defendant, Brown-Crummer Investment Company.

Endorsed:

No. 241 D. L. City of Gainesville vs. Southern Construction Company, et al. Admission, Stipulation and Waiver. Filed June 28, 1926. F. A. King, Clerk. U. S. District Court. By Mrs. E. S. Hughes, Deputy.

Verdict of Jury.

City of Gainesville,

vs.

Southern Construction Company, et al.

We, the jury, find in favor of Brown-Crummer Investment Company against the plaintiff, City of Gainesville, in the sum of $13,125.40 dollars, with interest thereon at the rate of six per cent per annum from date hereof, together with all costs.

We further find in favor of H. O. Head, executor of the estate of H. W. Head, deceased, and Southern Surety Co. upon the causes of action asserted by the City of Gainesville against them.

We further find that none of the parties herein take anything against any of the other parties herein except as aforesaid.

S. R. Little,
Foreman.

Endorsed:

D. L. No. 241. City of Gainesville vs. Southern Surety Co. et al. Instructed Verdict. Filed May 20, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

Judgment.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. D. L. 241.

City of Gainesville,

vs.

Southern Construction Co. et al.

On this the 20th day of May, 1926, this cause came on for trial; whereupon the plaintiff announced that it would no longer prosecute this cause as to the defendants Southern Construction Company and Harry D. Levy and Lester Levy, composing said company. It is therefore ordered that said Southern Construction Company and the said Harry D. Levy and Lester Levy be and they are hereby dismissed from this cause. Thereupon all parties hereto announced ready and thereupon came a jury of twelve men, consisting of S. R. Little and eleven others, who were duly impaneled and sworn; and after hearing the evidence and argument of counsel the court instructed the jury to return a verdict as follows:

"We, the jury, find in favor of Brown-Crummer Investment Company against the plaintiff, City of Gainesville, in the sum of thirteen thousand, one hundred and twenty-five dollars ($13,125.00), with interest thereon at the rate of 6% per annum from date hereof, together with all costs.

"We further find in favor of H. O. Head, executor of the estate of H. W. Head, deceased, and the Southern Surety Company upon the causes of action asserted by the City of Gainesville against them.

"We further find that none of the parties herein take anything against any of the other parties herein except as aforesaid."

Thereupon the jury returned their verdict in form, words and figures as so instructed by the court.

It is therefore the judgment and decree of the court that the defendant, Brown-Crummer Investment Company, do have and recover against the plaintiff, the City of Gainesville, the sum of thirteen thousand, one hundred and twenty-five dollars ($13,125.00), with interest thereon at the rate of 6% per annum from date hereof and all costs of this suit, for which let them have their execution and all proper process for the enforcement hereof.

It is further the judgment of the court that the plaintiff, City of Gainesville, take nothing against the defendant, H. O. Head, executor of the estate of H. W. Head, deceased, nor against the defendant, Southern Surety Company, upon any of the causes of action asserted by said plaintiff against them, or either of them,

and that the said defendants, Head and Southern Surety Company, do have and recover against the plaintiff all costs by them in this behalf incurred, for which let execution and all proper process be issued.

It is further the judgment of the court that none of the parties herein take anything against any of the other parties herein except as aforesaid.

It is further the judgment of the court that execution issue against each and all of the parties herein in favor of the officers of this court for the costs by said respective parties incurred, for the recovery of which let execution and all proper process issue.

It is further the order and judgment of the court that the plaintiff, City of Gainesville, be given forty-two (42) days in which to file motion for new trial, and ninety (90) days from the date hereof in which to file bills of exceptions.

It is further ordered that the above dismissal as to the Southern Construction Company and Harry D. Levy and Lester Levy shall in no manner affect the separate judgment recovered by the plaintiff against them in the District Court for Cooke County, Texas, and afterwards affirmed by the Court of Civil Appeals.

Endorsed:

No. D. L. 241. City of Gainesville vs. Southern Construction Co. et al. Judgment Rendered May 20th, 1926. Filed May 20, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

Bill of Exceptions.

In the District Court of the United States, for the Eastern District of Texas, Sherman Division.

No. B. L. 241.

City of Gainesville,

vs.

Southern Construction Co. et al.

Be it remembered, that the above entitled cause came on for trial on the 17th day of May, 1926, being the first day of the May term of said court, before the Hon. W. Lee Estes, the judge of said court, and a jury duly impanelled, and thereupon, the following, among other proceedings, were had:

Plaintiff's Evidence.

Charter of the City of Gainesville.

Plaintiff, the City of Gainesville, and the defendants, Brown-Crummer Investment Co., H. O. Head, administrator of the estate of H. W. Head, deceased, and the Southern Construction Company, offered in evidence the charter of the City of Gainesville as evidenced by the special act of the Texas Legislature approved March 17th, 1909, Special Laws of the 31st Legislature, pages 501 to 543 inclusive, and which thereafter, but during the same year, was adopted by vote of the people.

The provisions of the charter, having any bearing upon the questions at issue, are as follows:

a. That provision of Section 28, Article 2, saying: "All contracts, of whatever character, pertaining to

public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250) shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval by the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times. All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be opened for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder. The council shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid, but shall always, in every advertisement of public work or contract involving as much as $250, reserve the right to reject any and all bids. Pending the advertisement of the work or contract proposed specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid."

b. Section 29, Article 2, saying: "The council shall require good and sufficient bonds of all contractors, with at least two good and sufficient sureties, who shall be residents of the State of Texas. No non-residents of the state shall ever be received as surety on any bond payable to the City of Gainesville, except such guaranty

companies as may be satisfactory to the city council. When bondsmen are not residents of Cooke County, such proof of their solvency may be required as the council may deem necessary.

c. Section 1, Article 4, saying: "The city council of the City of Gainesville shall have power and authority by ordinance duly passed if it so elects to borrow money on the credit of the city for permanent improvements, for public buildings, for the permanent improvements of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer, and gas works; and the city council may issue bonds for the City of Gainesville for all or any of the above purposes to any amount not exceeding $150,000.00 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the City of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.

"No bonds shall be issued for any purpose except the purposes above named which shall not exceed $150,-

000 for any one year and for the purpose of refunding bonds previously issued.

"No bonds shall be issued for any purpose in excess of $2500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election, at the election so held, but if a majority of the votes polled shall be against the creation of such debt, it shall be unlawful for the city council to issue the bonds.

"In all elections determining the expenditure of money for the assumption of debt only those shall be qualified to vote who pay taxes on property in said city and are legally qualified voters therein.

"No bond shall be issued drawing more than five per cent interest and they shall be invalid if sold for less than par and accrued interest, and all bonds shall express upon their face the purpose for which they are issued.

"The ordinance authorizing any bonds to be issued shall provide for the creation of a sinking fund sufficient to pay the bonds at maturity and make provisions for payment of interest thereof as it matures and said sinking fund may be invested in the bonds of the State of Texas or in bonds issued by the counties of the State of Texas or such funds may be used for the purchase of bonds of the City of Gainesville which are not yet due, and neither interest or sinking fund shall be devoted to any other purpose whatever."

d. Section 3, Article 4, saying: "Provided, that said city may issue not exceeding $2500 in bonds when authorized by law so to do without holding an election for that purpose."

e. Section 16, Article 9, saying: "In addition to the other powers of the city council herein mentioned, it shall of its own motion, and the council is hereby invested with full power and authority to grade, gravel, pave or otherwise improve any street, avenue or other public highway, or any portion thereof within the limits of said city, whenever by a vote of a majority of the aldermen present they may deem such improvement for the public interest. And the amount for which said city is liable for said improvements and the amount for which the abutting property owners shall be liable and the manner of ascertaining the amount for which the city and property owner shall be liable for any such improvements and the manner of fixing the liens upon the property abutting upon such improvements, and the enforcement of such lien and the number of payments to be made, etc., as is fully set out in Chapter 9, Title 18; and Articles 544, 545, 546 and 547 of the Revised Statutes of the State of Texas (now Articles 1082 to 1085 inclusive of present Revised Statutes) are hereby adopted and re-enacted. It being intended by this section that the above articles of the Revised Statutees of the State of Texas shall in nowise be repealed by this act or in any manner amended or qualified, but the City of Gainesville is hereby given the power and authority to cause its streets and alleys and other public highways to be improved in the

manner herein mentioned and mentioned in said articles and all the aforesaid sections of the Revised Statutes of Texas shall remain in full force and as effective as if this charter had not been granted."

f. That portion of Section 19, Article 9, saying: "The provisions of this act shall be liberally construed, with the view to carry out the purposes of this charter, and in case of doubtful construction, it shall be resolved in favor of the city."

g. Section 13 of Article 9, saying: "This act shall be deemed a public act and judicial notice shall be taken there in all courts."

h. Section 19 of Article 9, saying: "All ordinances passed by the city council or which amends or repeals an ordinance now in existence shall be read upon three several days to the council unless a majority of the full board shall vote to suspend this rule."

i. Section 10, Article 7, saying: "For the purpose of conducting and transacting the ordinary business and administrative affairs of the city, the council shall meet in regular session the first and third Tuesday in every month and is also subject to be convened at any time on the call of the mayor for a special session."

j. Section 6, Article 7, saying: "The city council shall set with open doors, shall keep a journal of its proceedings, which shall be public and constitute one of the archives of the city. The council shall act only by ordinance, resolution or motion * * *. The ayes and nays shall be taken upon the passage of all ordinances or

resolutions and entered upon the journal of its proceedings, and every ordinance, resolution or motion shall require on final passage the affirmative votes of a majority of all the members of the city council present. No ordinance shall be passed finally on the date it is introduced, except in the case of public emergencies."

Obligation of H. W. Head to the City of Gainesville.

Plaintiff introduced the obligation of H. W. Head to the City of Gainesville, dated Sherman, Texas, September 10, 1920, and copied in the fifth paragraph of plaintiff's third amended original petition, filed April 13, 1926, which obligation relates to ten thousand paving warrants, which amended petition is referred to as showing the exact wording of said obligation; and in connection with the obligation of said Head, the plaintiff introduced the obligation of the Southern Surety Company to the City of Gainesville, dated the 20th day of September, 1920, and copied in the fifth paragraph of said amended petition, which is hereby referred to for the true wording of said obligation; and in this connection, the plaintiff introduced the obligation of H. W. Head to the City of Gainesville dated October 4th, 1920, and copied in the fifth paragraph of said amended petition, to which reference is made to the exact wording thereof, which obligation relates to thirty-seven thousand of Gainesville paving warrants therein mentioned, and the obligation of Southern Surety Co. dated September 20, 1920, following the obligation of said Head in said amended petition.

Instructions to Bidders.

Plaintiff introduced the instructions to bidders and the bid of the Southern Construction Co., and the contract between the Southern Construction Co., and the City of Gainesville, dated November 20, 1919, and the contract between the same parties and of the same date and the specifications attached and made a part of said contract, the same being as follows:

"Sealed proposals addressed to the city of Gainesville, Texas, will be received at the office of the Secretary until 8 P. M. November 18th, 1919, for furnishing all necessary material and machinery, and labor for the construction of certain street improvements for the city of Gainesville, Texas.

"Bidders must submit certified check in the sum of one thousand dollars ($1,000.00) payable without recourse to the order of Honorable E. N. Blackburn, mayor, as a guarantee that the bidder will enter into the contract and execute the bonds and guarantee agreement, in the forms provided herein within ten (10) days from the date of the notice of the award made to him by the above mentioned city. Bids without the required check will not be considered.

"Successful bidder must furnish bond in the amount of his bid, from a responsible Surety Company or from good and sufficient personal sureties, satisfactory to the above mentioned city.

All lump sum and unit prices must be stated in both script and figures. The above mentioned city reserves the right to consider the most advantageous

construction thereof or to eliminate the bid from consideration, as it may see fit. Unreasonable or unbalanced unit prices will subject the bid to elimination.

"Bidders are expected to inspect the site of the work and to inform themselves regarding all local conditions.

"Instruction to bidders, forms of proposals, plans and specifications, may be obtained at the office of the city engineer, R. G. Carraway Company, general consulting engineers.

"Gainesville, Texas, upon the deposit of $10.00 which will be returned upon the submission of a bona fide bid.

Bid of Southern Construction Company.

"*To the City of Gainesville, Texas.*

Gentlemen:

Pursuant to the foregoing instructions to the bidders, the undersigned bidder proposes to do all the work, furnish all the material upon which he bids, as provided by the attached plans and specifications, and binds himself on acceptance of his proposal to execute a contract and bond, according to the attached forms, for the performance and completion of the said work within the time specified and to keep said completed work in a state of repair for the period of five (5) years, from the date of completion and acceptance by the said city.

Items	Written Prices	Figures
Price per sq. yd. for 3″ Vertical Fiber Brick pavement complete on a 5 inch concrete foundation	Three & 40/100 Dollars	$ 3.40
Price per Sq. Yd. for 3″ Vertical Fiber Brick pavement complete on a 4 inch concrete foundation	Three & 20/100 Dollars	3.20
Price per square yd. for 2½″ Vertical Fiber Brick pavement complete on a 5 inch concrete foundation.	Three & 25/100 Dollars	3.25
Price per sq. yd. for 2½″ Vertical Fiber Brick pavement complete on a 4 inch concrete foundation.	Three & 05/100 Dollars	3.05
Price per sq. yd. for Tarvia treatment pavement complete on a 6 inch gravel foundation	One & 23/100 Dollars	1.23
Price per sq. yd. for ..... pavement complete on a .... inch		

foundation.	(Blank)	
Price per sq. yd. for		
.....		
pavement complete on a		
.... inch		
foundation.	(Blank)	
Price per lin. ft. for		
gravel concrete comb.		
Curb and Gutter.	Seventy Five Cents	.75
Price per lin. ft. for		
stone concrete comb.		
Curb and Gutter.	Eighty Cents	.80
Price per lin. ft. for		
gravel concrete		
Separate Curb.	Fifty Cents	.50
Price per lin. ft. for		
stone concrete		
Separate Curb.	Sixty Eight Cents	.68
Price per lin. ft. for		
gravel concrete		
Separate Gutter	Forty Eight Cents	.48
Price per lin. ft. for		
stone concrete		
Separate Gutter	Fifty seven Cents	.57
Price per lin. ft. for		
stone Separate Curb.	Forty Five Cents	.45
Price per lin. ft. for		
Oak Headers in place.	Fifty Cents	.50
Price per Cu. Yd. for		
Concrete in Culverts, etc.	Eighteen Dollars	18.00

Price per lb. for reinforcing steel in Culverts, etc.	Thirty Five Cents	.35
Price per cu. yd. for Earth excavation.	Seventy Five Cents	.75
Price per cu. yd. for Rock excavation.	Three Dollars	3.00
Price per cu. yd. for Overhaul per 100 ft.	Two Cents	.02
Price per pound for Culvert plates.	Twenty Five Cents	.25
Price each for Catch Basins complete in place	Fifty Five Dollars	55.00
Price per sq. ft. for four inch cement walk.	Twenty Three Cents	.23
Cost per day for common labor on extra work.	Four Dollars	4.00
Cost per day for Team labor on extra work.	Seven Dollars	7.00

The undersigned bidder agrees to accept deferred payments on contracts with property owners in one (1) and two (2) years, and to charge interest on the same at the rate of eight (8) per cent per annum.

The undersigned bidder agrees to complete the work upon which he has bid, within 180 working days, from the acceptance of his bond by the city.

(Signed) Southern Construction Company,
By Harry D. Levy, Dallas, Texas.

Contract Between the City of Gainesville and the Southern Construction Co.

The State of Texas, County of Cooke.

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the city of Gainesville, Cooke County, Texas, party of the first part, hereinafter called the city and the Southern Construction Company, of Dallas, Texas, party of the second part, hereinafter called the contractor:

Witnesseth: That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to commence and complete the construction of certain street improvements and all extra work in connection therewith as stated in the general specifications, and at his own proper cost and expense to furnish all tools, materials, machinery, labor, supervision and other accessories necessary for the said construction in accordance with the conditions and prices stated in the proposal attached hereto, and in accordance with the plans and specifications therefor as signed by the parties hereto, all of which are made a part hereof, and all in the manner and under the conditions hereinafter specified:

All the provisions of this agreement shall be performed in the city of Gainesville, Texas, and any suit

to enforce its provisions or for damages for breach thereof shall be brought in Cooke County, Texas.

In witness whereof, the city has caused its seal to be hereto affixed, and these presents to be signed by its mayor and attested by its city secretary, and the party of the second part have hereto set their hands and seal on the day, month and year first above mentioned.

(Signed) The City of Gainesville, Texas,
Party of first part,
By E. N. Blackburn, Mayor.

Attest:

S. A. Bryan,
City Secretary.

The Southern Construction Company
Party of second part.
(Seal) By Harry D. Levy.

Witness:

R. G. Carraway.

Agreement Between the City of Gainesville, Texas, and the Southern Construction Co.

The State of Texas, County of Cooke.

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the city of Gainesville, Texas, party of the first part, hereinafter called the city, and the Southern Construction Company, of Dallas, Texas, party of the second part hereinafter called the contractor.

Witnesseth: That for and in consideration of the city having waived the construction and maintenance

bonds, and guarantee agreement hereinbefore mentioned. The said party of the second part hereby agrees that they will in lieu of the said construction and maintenance bonds and guarantee agreement place in any bank in said city of Gainesville, designated by the said city, the sum of five thousand ($5,000.00) dollars in lawful moneys of the United States of America, or the equivalent satisfactory to the said city, said sum of moneys to be subject to all of the terms of the plans and specification hereto attached, which are made a part hereof, as if the same were in fact the said construction bond. Said sums of moneys or securities shall be returned to the party of the second part on the completion and acceptance of the work by the party of the first part.

The said party of the second part further agrees that they will accept the legally issued warrants of said city at par, in payment for the proportion of the contemplated street improvements payable by said city.

In witness whereof the city has caused its seal to be hereto affixed, and these presents to be signed by its mayor and attested by its city secretary, and the party of the second have hereto set their hands and seal on the day, month and year first above mentioned.

The City of Gainesville, Texas,
By E. N. Blackburn, Mayor.

Attest:

S. A. Bryan,
City Secretary.

The Southern Construction Company
By Harry D. Levy.

(Seal)

Witness:
R. G. Carraway.

General Specifications for Street Improvements.

Plans and Specifications:

The work shall be constructed according to the direction of the engineer and to conform accurately to the dimensions of the plans and to grades which he may furnish from time to time. The manner of construction shall be strictly in accordance with the specifications and plans or modifications thereof in writing by the engineer.

Any work or materials which may have been accidentally omitted in the description of the work, but which is clearly implied shall be furnished by the contractor the same as if it had been specifically stated.

Interpretation of Specifications for Street Improvements.

All the work shall be done to the satisfaction of the engineer, who shall in all cases determine the amount, quality, acceptability and fitness of the several amounts of work and materials which are to be paid for, and shall decide all questions which may arise as to measurements of quantities, or fulfillment of this contract on the part of the contractor, and shall determine all questions respecting the true construction and meaning of the plans and specifications and his determination and decision thereon shall be final and conclusive and binding on both parties to this contract.

Checking Plans:

Before starting construction or ordering materials, machinery, or other equipment, the contractor is required to carefully check the plans, the engineer shall be furnished with a written statement listing errors found, and the plans will be corrected accordingly, should any additional errors be discovered afterwards, the cost of correcting the work must be borne by the contractor.

Natural Conditions and Obstacles:

Bidders are required to inspect the site of the work before tendering, and the contractor shall be responsible for any loss he may suffer by reason of failure to inform himself of all conditions affecting the work.

The contractor agrees that he will sustain all losses or damages arising from the action of the elements, the nature of the work to be done under these specifications, or from any unforeseen obstruction or incumbrance on the line of work which may be encountered in the prosecution thereof.

Cleaning up:

On completion of each part of the work all rubbish and unsightly material must be removed and disposed of as directed by the engineer, and the streets and grounds left in a neat condition.

Prosecution of the Work:

The contractor will commence work within ten days from the date that his bond is approved by the city,

and shall prosecute the work systematically and energetically, so that all the work embraced in this contract shall be entirely completed within the period stated in the proposal.

Extension of Time:

Upon the written application of the contractor extension of time will be allowed for unavoidable delays that result from unforeseen causes which, in the opinion of the engineer are undoubtedly beyond the control of the contractor or could not be reasonably anticipated, and for delays caused by specific orders of the engineer.

Said application shall be accompanied by formal consent of the sureties, but an extension granted, whether with or without such consent, shall in no way release the sureties from their obligation which shall remain in full force and effect until the discharge of this contract.

Damage for Non-Completion:

It is distinctly understood that the time specified for the completion of this contract is of the essence of the contract, and the contractor shall not be entitled to claim performance unless the work is entirely completed in every respect on or before date specified, or on or before the date to which the contract period is extended under the provisions of the foregoing section entitled, "Extension of time" of

these specifications, if any extension of time has been granted thereunder.

However, if the contractor does not have the work completed by the date specified, he may make application for an extension of time, stating in the application that he will liquidate the damages by such extension, said amount, as herein stated, shall be deducted from the moneys due or to become due the contractor, and from such moneys the city will pay the engineer.

It is understood and agreed by all parties that the amount of compensation to be paid the engineer by the city covers only the period stipulated in this agreement, and any additional compensation to be paid the engineer, is incurred by reason of default of the contractor, and shall be paid by said contractor as special and admitted damages.

It is hereby agreed and understood that said additional compensation shall be deemed and taken in all courts to be liquidated damages for the non-performance of the contract in the manner aforesaid, and not in the nature of a penalty.

It is understood and agreed that the sum of twenty-five ($25.00) dollars per day is the additional compensation to be paid the engineer for time on this contract in excess of the period stipulated in the proposal thereof.

Maintenance of Contract:

The contractor shall be governed by the instructions of the city in all matters relating to the blockad-

ing of the streets from traffic while the work is in progress, and he will not be allowed to obstruct traffic on more than two adjacent or consecutive city blocks at any one time without the written consent of the city.

The contractor shall pile such material as is necessary to store on the street during the progress of the work in neat piles in such a way as to least obstruct traffic, and no materials shall be piled on the sidewalks within fifteen feet of any fire plug. Upon completion of any section of street, all surplus materials or rubbish shall promptly be removed by the contractor.

Permits:

The city will in all cases give the right to use the streets and alleys. All other permits for securing materials, water, material yards, camp sites, right to use private property, including permits for crossing railroad tracks, and all such other permits as he shall desire, or which are necessary to the proper execution of the work must be secured by the contractor at his own expense.

Character of Workmen:

The contractor will employ competent foremen and experienced artisans for work requiring especial skill. Foremen or workmen deemed incompetent, disorderly, or insubordinate by the engineer shall upon his written request to the contractor be immediately removed from the work.

The contractor in the construction of the work, shall give preference in employment to the citizens of the aforesaid city and when citizens of said city are not available, shall give preference to citizens of the State of Texas.

Working Appliances and Progress:

The contractor is to use such methods and appliances for the performance of the work embraced under this contract as will secure satisfactory results and a rate of progress which, in the opinion of the engineer will secure completion of said work within the time herein specified. If in the opinion of the engineer the methods or appliances used by the contractor are not sufficient to produce the proper character of work or rate of speed, he may order the contractor to increase their efficiency, which order must be conformed to, but the failure of the engineer to demand such increased efficiency, in no way relieves the contractor from his obligation to secure the quality of work or the rate of progress outlined in these specifications.

Sub-Contracting:

The contractor shall not assign any of the work, or moneys payable under this contract, nor sub-let the work to be done, or any portion of it without the written consent of the city, provided further that should any sub-contracts be let with the approval of the city they shall be subject to all the terms and provisions of this contract, and shall not in any degree

nor under any circumstances alter the responsibility of the contractor under this contract. The city may at any time revoke authority for sub-contract which may have been previously granted.

Inspection:

All materials intended to be used in the execution of this contract shall be subject to the inspection and acceptance or rejection of the engineer or his representative, and all labor necessary in handling such material during such inspection or tests shall be furnished by the contractor, the contractor shall also furnish all necessary testing machines and apparatus that may be required in these specifications.

The engineer, his assistants or inspectors, shall at all times have free access to all parts of the work or places where materials are stored or in progress of manufacture. Defective work or materials may be condemned by the engineer at any time previous to the final acceptance, and notwithstanding that it may have once been inspected and passed by assistants or inspectors. When material has been condemned it shall immediately be removed from the line of work and as soon as possible from the site. Should the contractor fail to do this upon notice, the engineer is empowered to move said material at the expense of the contractor.

Samples of all materials used in the work may be taken by the engineer for tests from each and every shipment, and no material shall be used on the work until permission is given by the engineer to use same.

Work in all cases shall remain at the risk of the contractor until the plans and specifications have been fully complied with, and until the work shall have been finally accepted by the engineer.

The contractor shall give the engineer adequate notice of the place of manufacture or purchase of all materials so they may be inspected before shipment without delay.

Protection of Finished Work:

The contractor will be held responsible for all materials or work to the full amount of payments made thereon, and he shall be required to make good at his own expense whatsoever before final acceptance thereof.

The city shall have the right to take possession of and use any completed portion of the work, notwithstanding the time for completing the entire work may not have expired, but such taking possession of and use shall not be deemed an acceptance of the work so taken and used.

Royalties:

No allowance will be made for fees for the use of any patented article, appliance, method or material which may be used upon or in any manner connected with the construction or maintenance of any part of the work embraced in this contract. And the contractor hereby agrees to hold the city harmless against any such claims for fees.

Engineer:

Whenever the word "Engineer" is used herein, it shall be and is mutually understood to refer to the R. G. Carraway Company, general and consulting engineers, and to their properly authorized agent or agents, limited to the particular duties entrusted to them. The word "City" refers to the city mentioned in contract hereto attached.

The engineer shall have the final decision in all matters or disputes involving the character of the work, or the compensation to be made therefor, or any question arising under this contract, and such decision shall be final and binding on both parties hereto. He shall, as representing the city, have the option of making any change in line, grade, form, position, dimension or materials of the work herein conteemplated, either before or after construction has begun, and all explanation or direction necessary for carrying out and completing satisfactorily the different description of the work will be given by him.

Extra or Decreased Work:

All work in addition to that described in the plans and specifications which may become necessary or desirable, the city may require the contractor to do or the city may make separate contract therefor with other parties to whom proper facilities and courtesies shall be extended by the said original contractor. For extra work done by the contractor of the same character as that included in the original contract he shall

be reimbursed according to the state unit prices, and for work of a different character actual cost plus fifteen per cent, to cover superintendence, plant, tools and profit.

Claims for extra work done during any month shall be presented to the engineer at the end of that month for his decision. Claims not so presented shall not be valid. Should it appear desirable to make changes in plans requiring a less amount of work of the contractor than contemplated in the original plans such changes may be ordered in writing by the engineer.

Responsibilities:

The contractor will be responsible for all parts of the work including that which has been partially accepted and paid for until the final acceptance of the total completed work, and shall be liable for all losses or damages thereto arising from floods or storms, the nature of the work, accidents, improper use of materials or equipment, or unforeseen difficulties which may be met during the progress of construction or before final acceptance, or from accidents caused directly or indirectly by any of his workmen, and shall protect and save the city harmless against claims for personal injuries or damages to property resulting from the work.

The contractor shall at all times keep the work protected by proper guards in the day time and red lights at night and otherwise observe all city ordi-

nances applying to keeping open passageways, obstructing, tearing up, clearing and cleaning the streets of dirt, stones, or rubbish in hauling.

At all times while the work is in progress the contractor shall keep a superintendent or head-workman upon the site, and also a copy of the plans and specifications. Instructions given to said superintendent or head-workman shall be considered as to have been given to the contractor.

Abandonment:

In the event of the contractor abandoning the work to be done under this contract, or if the contract or any of the moneys or orders payable thereunder shall be assigned or sub-let except as herein provided, or if the said work is unreasonably delayed, or if the said work is being done in bad faith and the provisions of this contract are willfully violated, the city reserves the right and option to annul and cancel this contract upon five days written notice to the contractor, and to complete the remaining portion of the work to be done in such manner and by such means as it may deem advisable. Such action shall not entitle the contractor to claim for damages on account of said annulment nor shall it affect the right of the city to recover the damages which may arise from the failure of the contractor to perform his contract.

In case of such annulment all moneys due the said contractor or retained under the provisions herein shall be forfeited to the city, but such forfeitures shall not,

however, release the contractor nor his sureties from the fulfillment of the contract. Said forfeiture shall, however, be credited to said contractor and his sureties toward any greater sum for which they may be liable to the said city. In case of such annulment the city shall have the right and option of taking over all plant equipment and material belonging to the said contractor or under control at the site of the work and to utilize the same for completing the work. In such event the city shall maintain the condition of such equipment as found save for reasonable wear and tear.

Final Inspection:

Before the completed work is accepted and paid for in full the contractor shall notify the engineer in writing that it is ready for final inspection and test. Upon receipt of this notification the engineer will arrange to give the work minute and thorough inspection in person. Any defects or omissions noted during the inspection and testing must be made good by the contractor without extra charge before the work will be accepted and paid for in full, tools, appliances and labor for the tests are to be furnished by the contractor.

Payments:

The abutting property owners are required to pay three-fourths (¾) of the cost of street improvement, exclusive of street and alley intersections, according to the Front Foot plan or rule; that is, in proportion to the total cost of the improvement as his frontage is

to the total frontage of property abutting on said street, and the city will pay one-fourth (¼) of said total cost of street improvements, plus the street and alley intersections, except the curbs along, around or in front of the property of property owners, which shall be paid for totally by said property owners; the plans indicate the names of said owners to whom the contractor shall look for payment of his certificates.

The city will assess three-eighths (⅜) of the total cost heretofore mentioned, against each of the abutting property owners and their property on the streets so to be improved, and will issue to the contractor assignable certificates evidencing such assessment, and declaring the liability of such owners and their property for the payment of such assessment, which certificate shall recite that one-third (1/3) of the face value thereof is due and payable on demand, one-third (1/3) on or before one (1) year from date thereof, one-third (1/3) on or before two years from date thereof, and that the deferred payments shall bear interest at the rate of eight (8) per cent per annum, and that said property owners shall have the right or option to pay either or both deferred payments, with accrued interest thereon, at any time before maturity. The contractor hereby agrees to accept said certificates in payment for the proportion assessed against said property owners, and to protect and hold the city harmless from the collection thereof, except as herein provided.

The contractor shall ascertain whether or not any of said abutting property is exempt under the law from lien for improvements and also whether or not the owner thereof possesses other property out of which there may be realized a personal judgment against said owner, and a written report of such facts shall be submitted to the mayor. If it should appear that any of such premises are so exempt, and that a personal judgment against the owner thereof could not be realized by execution, and that said owner refuses to satisfactory secure the payment of said certificate of assessment, then the contractor shall not be obliged to lay the proportional part of said pavement and other improvements connected therewith, along, in front or about such premises. If it should appear that any of such premises are not so exempt, or that a personal judgment against such owner can be realized by execution, then in either event, the contractor shall proceed to lay the proportional part of said pavement and improvements connected therewith, along, in front, or about such premises and his contract shall not be considered complete until such pavement is laid.

The city shall exercise all of its charter rights and powers governing assessment proceedings against the owner and said premises, and upon demand of the contractor, shall institute the proper legal proceedings and prosecute same to effect against the owner for the purpose of securing personal judgment against said owner, or said premises, or both, but the city shall not guarantee the collection of any such judgment, nor

shall it become liable for the collection of the same, nor the enforcing of any lien that might be obtained, nor shall the city pay any of the cost of assessment proceedings nor the costs of any court proceedings to obtain a personal judgment against the owner or in affixing a lien upon said premises.

The cost of paving shall be paid as follows, to-wit:

The cost thereof between and under the rails and tracks, and two feet outside thereof and the extra concrete and foundations, ties, etc., thereunder as set forth in these specifications shall, be paid by any railway company or railroad companies that may be occupying any street improved or on, over or across streets that are improved under this contract, on estimates in writing made by the engineer of the city, on the tenth day of each month after the beginning of the work, embracing the work done, material furnished, and material on hand, to the last of the previous month, and since the last estimate, ten per cent of each estimate being held back and reserved by the city or railway company or railroad companies until final completion of the entire street and acceptance by the city.

The city shall pay the cost of improvement of the streets and street and alley intersections except as herein stated that shall be paid by abutting property owners, and railroad companies, provided that in no event shall the city pay for, or be responsible for more than one-fourth (¼) of the total cost of said improvement exclusive of curbs, between the street and said alley intersections, and the total cost of said street and

alley intersections other than the total cost of said curbs along or in front of the abutting property.

The owners of property abutting upon said improvements shall pay the whole cost of installing curbs and three-fourths (¾) of the entire cost of said improvements between the said street and alley intersections. The proportion of said cost payable by said owners shall be paid as hereinbefore set out. Said amounts payable by any owner and the assessment therefor by the city shall be a personal liability against said owner, and a lien against said property according to law

The amount payable by the city for said improvements shall be payable on estimates in writing by the engineer on the first regular meeting of the governing body of said city after the first day of each month after beginning of the work, embracing work done and materials delivered, to the last day of the previous month and since the last estimate, ten per cent (10 per cent) of each estimate being held back and reserved and payable on the completion of the work on the particular street on which estimates are given, and the acceptance by the city.

The city will pay and the contractor shall receive as full compensation for everything furnished and done by the contractor under this contract, and also for all damages arising out of the nature of the work aforesaid, or caused by floods, or difficulty encountered in the prosecution of the work, and for all risks of every description connected with the work, and for all ex-

penses incurred by, or in consequence of, the suspension or discontinuance of the work as herein specified, and for well and faithfully completing the work, and whole thereof, as herein provided, and for making repairs to and maintaining the work in good condition until the final acceptance, the prices stipulated in the proposal hereto attached.

All remedies in this contract shall be taken and construed as cumulative, that is in addition to each and every other remedy herein provided, and the city any and all equitable and legal remedies which it would in any case have.

Before final payment is made, the contractor shall execute and deliver to the city his bond on the form hereto attached, in the sum of twenty-five per cent of the entire cost of said improvement shown by the estimates of the engineer, with some good and sufficient surety company authorized to do business in the State of Texas, and acceptable to the city, conditioned, that the said contractor will well and truly keep such improvements in good repair, reasonable wear and tear excepted of which the mayor and engineer shall be the sole judges for a period of five (5) years from the date of acceptance of the completed work, which bond shall be approved by the city attorney, and governing body of said city.

No person or corporation, other than the signers of the contract as contractor, has any interest hereunder and no claim shall be made or be valid, and neither the city nor any official thereof, shall be liable

for or be held to pay any money except as herein provided. The acceptance by the contractor of the last payment shall operate as and shall be a release to the city and every officer and agent therefor, from all claims and liability to the contractor for anything done or furnished, for or leading to this work, or for any act or neglect of the city, or its officers, agents, or employees, or for any reason relating to or affecting the work.

Excavation and Haul:

The contractor shall excavate to the grade and line given by the engineer. No plowing shall be done within two inches of sub-grade. All stakes and their markings shall be maintained by the contractor.

The contractor's bid for excavation includes the hauling of excavated materials a maximum distance of two thousand feet, and the city shall have the right to require the contractor to place said excavated material at any point within city limits, and in case the city requires the contractor to haul said material a greater distance than above stated it shall pay for the hauling of same for each additional one hundred feet per cubic yard the price as stated in the proposal attached hereto. No fill or embankment shall be paid for unless made from actually borrowed material.

Grading:

The contractor shall dress all sub-grades to correct grade and contour, including all portions of the street where fill is made. The contractor shall roll with a

ten ton roller such filled portions, until thoroughly compacted. After rolling, grade stakes will be placed by the engineer, and the contractor shall then bring the grade to that indicated by said stakes. Whenever fill is made the contractor shall use the excavated material from other parts of the streets, if same is within the above mentioned free-haul, and he shall not be entitled to claim pay for any part of said fill made from such excavated materials. The contractor shall roll and portions of the sub-grade until the same is compacted to the satisfaction of the engineer. In case "boggy" or soft spots are found in the sub-grade the contractor shall remove said "boggy" or soft spots and replace same with sand, sand and gravel, or other material designated by the engineer which shall be packed or tamped in place to his satisfaction.

Vitrified Pipe Storm Sewers:

All storm sewer shall, unless special permission be given to use other materials, be constructed of first class hard burned, salt-glazed vitrified clay sewer pipe of the hub-and-spigot pattern, of standard thickness and dimensions of hubs. The dimension of hub shall be sufficient to leave an annual space for cement of at least 3/8 of an inch thickness for six, eight and ten inch pipe, and 1/2 inch thickness for larger diameters.

Pipe may be furnished in lengths of two, two and one-half or three feet, all pipe and specials shall be sound and well burned and free from broken blisters, lumps, or flakes which are thicker than one-sixteenth

of the nominal thickness of the pipe and whose largest diameter is more than one inch. Pipe and specials having defects greater than the above shall not be used unless in the opinion of the engineer such defects can be placed in the top half of the sewer. Pipe on specials having fire cracks or other cracks extending through their thickness shall be rejected.

Pipe designated to be straight which varies more than one-eighth of an inch from a straight line shall not be used, neither shall there be any variation between any two diameters of a pipe greater than one-twenty-fourth the nominal diameter.

Pipe or specials having broken bells shall not be used, or pipe or specials which show a want of thorough vitrification or fusion, use of improper or insufficient materials, or methods of manufacture, shall be rejected.

All specials, "T," "Y," curves, etc., required shall meet all requirements as above specified, and shall be furnished and set by the contractor without extra charge.

Drain Tile:

If in the opinion of the engineer the sub-grade should require draining, the contractor shall lay first class sewer pipe connecting same to the nearest catch-basin or man-hole, in the manner and under the direction of the engineer, which shall be paid for as extra work.

Trench Excavation:

The trench shall be excavated exactly to line and grade. The bottom of the trench shall have a clear width at least one foot greater than the external diameter of the body of pipe. The last four inches shall be excavated only a few feet ahead of the pipe laying, by men especially skilled, measuring from an overhead line set parallel to the grade line of the sewer. The bottom of the trench shall be rounded to fit the pipe, and holes shall be dug for the bells so that proper construction of the joints can be had, and so as to give uniform bearing of the pipe.

Rock in Trench:

When pipe is to be laid through rock too hard to permit the digging of bell holes, the trench shall be excavated four inches deeper than grade, the trench is to then be refilled with sand or other suitable material, tamped to grade, and the pipe laid thereon. When rock is encountered the engineer shall be notified so that he may measure same before blasting is done. Rock removed which has not been measured by the engineer will not be paid for as rock excavation. Measurement for rock excavation will be limited to six inches on either side of the body of the pipe, and trench slopes shall be eight vertical to one horizontal. In all cases of blasting the blast shall be covered in such a manner as to limit the flying pieces of rock to the trench, and the engineer may limit the number of simultaneous discharges. Local laws governing the

storage, handling and discharge of explosives shall be complied with. No blasting shall be done within twenty feet of the finished sewer, or ten feet of any uncovered gas or water main, provision shall be made to exclude pieces of rock from the finished sewer while blasting is in progress.

No soft, loose, or broken rock, impacted boulder, or hard pan, but only such rock as may require blasting shall be considered as rock excavation, the engineer to be the judge thereof.

Sheeting:

Whenever necessary to prevent caving, injury to adjacent pipes or buildings, the contractor shall brace and sheet the trench in such a manner as to overcome the difficulty, at his own proper cost and expense, if it should be decided to leave the bracing and sheeting in the trench permanently by order of the engineer, same shall be cut off one foot below the surface and shall be paid for by the city at the stated price in the proposal hereto attached.

Refilling:

In refilling, earth free from stones shall be carefully placed by hand under and around the pipe and two feet above same, and carefully tamped in layers not exceeding six inches in depth, the remaining portion may be done by means of scrapers or other suitable appliances and must be compacted to the satisfaction of the engineer.

Protection to Buildings:

The contractor shall take all necessary precaution to protect buildings and other structures from injury on account of his work, and shall be responsible for all damages thereto.

Pipe Laying:

In pipe laying each piece shall be laid exactly to grade by measurement from the invert to a tightly stretched line or cord set parallel to the grade line and supported every twenty-five feet. The joints shall be tightly packed and beveled off with the No. 1 mortar herein specified, the cementing of joints must be done two pipe lengths behind the pipe layer. The bell holes must immediately be filled with sand so as to hold the mortar in place. Especial care must be taken to wipe the inside of each joint so that no projection of cement will be left inside the finished sewer.

Existing Sewers and Water Mains:

Whenever existing sewers and water mains are encountered in the work, all necessary precaution shall be taken to protect them from injury, but if injury should be done to them, the contractor shall make the proper repairs at his own cost and expense.

In case it should be necessary to change the grade of any sewer, drain or water main encountered, the work of such changing of grade shall be done by the contractor under the direction of the engineer, and paid for by the city as extra work."

Opening of Bids and Action Thereon by City Council as Shown by Minutes.

Plaintiff read from the minutes of the city council of the City of Gainesville showing that the council met at 7:30 P. M. on November 18th, 1919, and opened the bids for the proposed paving, the Southern Construction Co., and the Vaughn & Gardner Co., being the only bidders, and that the bids, after being opened, were laid over until November 19th, 1919, and that the council adjourned to meet at 7:30 P. M. November 19th, 1919, and that the council met in adjourned session on November 19th, 1919, and the minutes of this meeting recite:

"The bids were taken up and discussed at 7:30 P. M. The bidders were asked in separately and made such statements regarding their bids as they wished. After hearing these statements, the council discussed the merits of the respective bids. Alderman Thomas made a motion that the bid of the Southern Construction Company be accepted as presented leaving off the construction bond required and the contracter to put up $5000.00 in collateral satisfactory to the council and pave with brick on the square Dixon street to Broadway, Commerce street to Scott street, material to be left open, Dixon street to M. K. & T. R. R., material to be left open and the mayor and secretary be authorized to make the contract with the Southern Construction Company. A yea and nay vote was taken and resulted in eight yeas and no nays".

Ordinance Confirming Contract Between the City of Gainesville and the Southern Construction Company.

Plaintiff read in evidence an ordinance of the city council entitled, "An ordinance confirming contract between the City of Gainesville and the Southern Construction Company, A co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the City of Gainesville, Texas in accordance with proposal of contractor and plans signed by both parties thereto and made a part thereof; providing for the issuance of City of Gainesville Street Improvements warrants as evidence of the city's debt therefor; providing for the levying of a tax to pay the interest and sinking fund for its redemption at maturity; and declaring an emergency."

Approved the 16th day of December, 1919.

Which ordinance is attached as an exhibit to plaintiff's third amended original petition and is hereby referred to and made a part of this bill of exceptions, the same as if copied herein.

Ordinance of City Council Ordering an Election Concerning State Paving Law.

Plaintiff introduced an ordinance of its council dated September 16, 1919, ordering the question of the adoption of chapter 11, title 22 of the revised statutes, known as the state paving law, to be submitted to the qualified tax-paying voters of the city, at an election to be held for that purpose on October 21, 1919, and the

minutes of November 4, 1919, showing that the returns of this election were canvassed and that a majority of 322 were in favor of such adoption and an order of the same date declaring the result of the election and the adoption of said title and chapter.

The minutes recite that the city attorney read the ordinance and contain a copy of it, but in reference to the passage of said ordinance, the minutes are as follows:

"Alderman Robbins made a motion that the ordinance be placed upon its second reading by caption. Motion carried.

"Alderman Robbins made a motion that the ordinance be placed upon its second reading by caption. Motion carried.

"Alderman Robbins then made a motion that the ordinance be adopted. A yea and nay vote was taken which resulted as follows: Yeas, 10. Nays, none. Thereupon, the mayor declared the ordinance duly adopted."

Resolutions of City Council Concerning Auditing and Allowing Estimate for Material Furnished and for Work Performed.

Plaintiff introduced a resolution of its council of October 5th, 1920, as follows:

Auditing and allowing estimate of the Southern Construction Company, for materials furnished and

work performed in the construction of street improvements in and for the City of Gainesville, Texas.

City Hall, City of Gainesville, Texas.

October 5th, 1920.

The city council of the City of Gainesville, Texas, met in regular session in the city hall in said city on this the 5th day of October, 1920, at which meeting the mayor, city secretary and the following members of the board of aldermen were present to-wit:

Present: Geo. A. Beck, R. L. Kendall, C. M. Buckingham, J. E. Bramble, S. F. Robbins, A. M. Bell, W. B. Nowell, and Lee Lewis;

when the following proceedings, among others, were had, to-wit: The mayor offered for consideration and passage a resolution providing for the allowance of the estimate and claim of the Southern Construction Company, Contractor, for materials furnished and work performed in the construction of certain street improvements in and for the City of Gainesville, under its contract with the said Southern Construction Company of date November 20, 1919.

Moved by Alderman Buckingham and seconded by Alderman Kendall that the resolution, including claim of contractor, be read in full.

Motion carried, and the resolution and claim were read in full by the city secretary.

Moved by Alderman Buckingham and seconded by Alderman Kendall that said resolution be adopted.

Ayes: Buckingham, Kendall, Beck, Bell, Bramble, Robbins, Nowell and Lewis.

Nays: None.

The Resolution Follows:

Whereas, on the 20th day of November, A. D. 1919, the City of Gainesville entered into a contract with the Southern Construction Company, Contractor, for the construction of certain street improvements in and for the City of Gainesville; and

Whereas, on the 6th day of April, 1920, there was presented to this council, an estimate and claim of the said Southern Construction Company, said claim being for estimate No. 1 under said contract, in the amount of $3000.00, which claim was duly approved and allowed, and warrants numbered one (1) to three (3) inclusive, in the denomination of $1000.00, aggregating $3000.00, were delivered to the said Southern Construction Company, Contractor; and

Whereas, on the 21st day of September, 1920, there was presented to this council, an estimate and claim of the said Southern Construction Company, said claim being for estimate No. 2 under said contract, in the amount of $10000.00, which claim was duly approved and allowed, and warrants numbered forty-one (41) to fifty (50) inclusive, in the denomination of $1000.00, aggregating $10000.00, were delivered to the said Southern Construction Company, Contractor; and,

Whereas, the said Southern Construction Company, has furnished additional materials and performed ad-

ditional labor under said contract and in accordance with the plans and specifications attached thereto and made a part thereof, and for said additional materials and work, the said Southern Construction Company has presented to this council this third estimate and claim, which claim and estimate is in words and figures as follows, to-wit:

Estimate Number Three.

To the city council of the City of Gainesville, Texas.

Gentlemen:

We present to you below estimate No. 3, being claim for additional materials furnished and additional work performed under contract with the City of Gainesville, Texas, dated November 20th, 1919, for partial costs of the construction of street improvements provided for in said contract, to-wit:

$17000.00, materials furnished and work performed.

Respectfully submitted,
Southern Construction Company.
By Lester Levy.

And, whereas, the materials so furnished and the work performed and covered by said claim, has been by this council inspected and accepted by it, to be in accordance with said contract and the plans and specifications adopted by this council, and it has been determined by this council that said materials and work are well

worth the price as agreed to be paid therefor as reflected in said claim and estimate; and,

Whereas, said claim has been duly audited and found to be correct.

Therefore, be it resolved by the city council of the City of Gainesville, Texas, that the claim of the said Southern Construction Company covering the additional materials furnished and labor performed in the construction of said street improvements, aggregating the sum of $17000.00 be and the same is hereby approved and allowed.

That in accordance with the terms and provisions of said contract, and the claim of the said Southern Construction Company presented to this council, there shall be delivered to said Southern Construction Company, City of Gainesville Street Improvement Warrants, Series A-1, to the amount of $17000.00, being warrants Nos. 34 to 40 inclusive, in the denomination of $1000.00 each, dated Nov. 20, 1919, bearing interest at the rate of 6% per annum, authorized to be issued by an ordinance duly passed by the city council of the said city on the 16th day of December, 1919, and recorded in Book 6 at pages 570, *et seq.*, of the minutes of this council, evidencing the indebtedness due by said city to the said Southern Construction Company, its assigns or bearer.

That the City of Gainesville has received full value and consideration for the warrants herein authorized to be delivered.

Passed, this the 5th day of October, A. D. 1920.

Approved, this the 5th day of October, A. D. 1920.

(Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:

S. A. Bryan,
Secretary, City of Gainesville, Tex."

Said resolution was a typewritten carbon copy in which blanks had been left and the blanks filled in with a pen, the blanks so filled in being: "regular" before "session," "5th" before "day of October," the names of the aldermen, and the name of the aldermen making and seconding the motion, "17000.00 material furnished and work performed," "Later Levy" after "by," "$17000.00," "A-1," "Nos. 24 to 40."

In this connection, plaintiff offered in evidence, the resolution of its council of September 21st, 1920, providing for the issuance of warrants 41 to 50 inclusive, which was also a typewritten carbon copy with blanks left and filled in with a pen as in the resolution of October 5th, 1920, but the name of H. D. Levy appeared instead of Lester Levy, and the blank filled in concerning what had been done was as follows:

"Materials furnished and labor performed on Dixon, Commerce, Main and California streets $10000.00."

In this connection, plaintiff introduced a resolution of the council, dated November 2nd, 1920, which was in like manner a typewritten carbon copy with blanks left and filled in with a pen in like manner as the two preceding resolutions, Lester Levy's name being inserted in one of the blanks and the filled-in blank in reference to what had been done was as follows:

"Work performed and materials furnished, $10000.00."

This resolution directed the issuance of warrants 14 to 23 inclusive. To this was attached a blank typewritten form for the certificate of the secretary, and a blank affidavit to be signed by the mayor and aldermen, and a blank for a certificate in reference to the signature of the mayor, secretary, etc. All of the resolutions for the issuance of warrants had similar blanks for the affidavit of aldermen and the like.

In this connection, the plaintiff introduced a resolution of its council of November 16th, 1920, providing for the issuance of warrants Nos. 4 to 13 inclusive, which was also a typewritten carbon copy with blanks left and filled in with a pen in a similar manner to the others, and also containing typewritten blanks for the affidavits of the aldermen, certificate and the like.

There was a previous resolution of April 6, 1920, directing the issuance of warrants 1, 2 and 3 for $1000.00 each, which warrants have been paid and were issued for paving done and accepted, and are omitted as immaterial.

The warrants were in the form as set forth in the third paragraph of plaintiff's third amended original petition, and the transfer upon each warrant from the Southern Construction Co. with the exceptions above stated the last named four resolutions were in form and substance the same as the resolution of October 5th, 1920, to bearer was as set forth in said third paragraph.

Motions of Aldermen Thomas and Barrett, Concerning Paving as Shown by Minutes of Journal of the City Council.

The minutes or journal of the council contain the following:

September 16th, 1919.

"Alderman Thomas made a motion that the city engineer prepare plans and specifications and advertise for bids for paving the court house square and Commerce street from California street to Scott street with brick. Motion carried" (Book 6, page 524).

"On motion of Alderman Thomas, the council agreed to pave the intersections on any street that Mr. Levy, the paving contractor can sign up the property owners on, and the council gave him an option on Lindsay street and East and West California street" (Book 6, page 524).

September 16th, 1919.

"On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney" (Book 6, page 528).

This, and the foregoing paragraphs of this bill, contain all that appears on the minutes of the council concerning the paving in question prior to the opening of the bids.

F. M. Savage—Direct Examination.

MR. F. M. SAVAGE, witness for the plaintiff, testified:

My name is F. M. Savage. I reside in Gainesville, Texas. I have been secretary of the City of Gainesville for five years. I have the paving contract between the City of Gainesville and the Southern Construction Co. I do not think there are any specifications on file except what is contained in the contract. I have never been able to find the instructions to bidders and the specifications except as contained in the contract.

(This instrument has already been copied in this bill). There was a bond for $5000.00 I believe, given by Mr. Head and Mr. Potter. I was not secretary at the time that bond was given. I was not secretary in October, November and December, 1920, when the resolutions for the issuance of the warrants were passed. I become secretary on the 20th of January, 1921. At that time, there had been some tarvia paving done on Dixon and perhaps on Davis street. The Southern Construction Co. did quite a lot of brick paving after that. The brick paving was on the public square and on that part of Dixon street from the square to Gorham, and on Commerce street from the square to Scott. That brick paving was started after I became secretary and afterwards accepted but I can't say just when. The acceptance on

Dixon street is dated May 17th, 1921. The first brick paving I think was done on the east side of the public square. At the time the resolutions were passed, none of the brick paving had been done. The records show that the city had paid freight on one car of brick. The first car of brick was received October 21st, 1920. The second car on January 11th, 1921. There were three cars received at once and then they came in pretty rapidly—on the 15th one, on the 18th one, on the 19th, 26th and 27th. The city was paying the freight on these. Some of the brick come from Thurberville and some from Coffeyville, Kansas. I don't think my records show which one. There is no estimate by the engineer on file in reference to the $17000.00 worth of material furnished and work performed mentioned in the resolution of October 5th, 1920. The resolution of November 2nd, 1920, says, "Work performed and material furnished, $10000.00." There is no engineer's estimate on file. I know nothing except that the resolution says. The resolution of November 16th, 1920, says, "Work performed and material furnished, $10000.00." No engineer's estimate is on file and there is nothing except what the resolution recites. I have never found any estimates by the engineer except what is recited in the resolutions. There were $50000.00 of paving warrants issued to the Southern Construction Co. in all and $44000.00 of them are still outstanding, $6000.00 having been paid. Warrants 1 and 2 maturing on March 1st, 1921, were paid; warrants 3 and 4 maturing on March 1st, 1922, were

paid; and warrants 5 and 6 maturing March 1st, 1923, were paid, and all the coupons maturing on the entire series up to that date were paid. The brick paving was done in 1921. I have never issued to Brown-Crummer Co. or the Southern Construction Co. a check for paving since I have been in office. The estimates made since I have been in were made in order to reach the cost that was due from the property owners. Just as soon as one of these estimates was made, Mr. Levy would come in and demand his certificate. That is what these estimates were made for that I spoke of and the only ones I have. I have an estimate submitted on March 1st, 1921, and reads like this: "Cost to property for engineering work done as to date March 1, 1921, Southern Construction Company, contractor, Dixon street from Broadway to Gorham, total cost to property, $5012.85; the Square on the east and south sides; total cost to property, $6108.58; total cost to property, $11121.23. Total cost to property not including engineering, $10591.63. Cost to property for engineering, $529.60; cost to property for engineering on tarvia portion of North Dixon street, $570.41; total cost of property of engineering, $1100.01." No warrants were issued to the Southern Construction Co. for paving that was done while I was secretary. The tarvia paving was paid for before I went into office, and I had nothing to do with that. The public square was paved with brick after I went into office and Dixon street from the square to Gorham and Commerce street from the square to Scott, in fact, all the brick paving was done while I was

secretary. Since I have been secretary, no warrants were issued to the Southern Construction Co. They had already been paid in advance.

W. P. Springfield, Direct Examination.

W. P. SPRINGFIELD, for the plaintiff, testified:

My name is W. P. Springfield. I have been street commissioner for the City of Gainesville for the past fourteen years. I remember Harry Levy and Lester Levy, who claimed to be the Southern Construction Co. In 1920, they did some paving on North Dixon street from Gorham street to Haight street, and a little on Davis street. It was tarvia paving on North Dixon street. It was also tarvia on Davis street, except they used liquid asphalt instead of tarvia. They did no brick paving in 1920. I think they broke dirt for brick paving in December, 1920, or some time along about the middle of the month on the northwest corner of the square. They finished the brick paving in 1921. Up to January 1st, 1921, there had been a little excavation done on the north side of the square. There wasn't any brick work done at all. There hadn't been any brick laid. If the Southern Construction Co. had any cement on hand in 1920, I didn't know anything about it. I was looking after paving a part of the time. They had no brick on hand in 1920, that I know anything about. I think the brick came in the first part of 1921. The brick come from three different places, some from Thurberville, some from Coffeyville, Kansas, and some from another

place, I don't know where—I think from Oklahoma. These bricks were all shipped in 1921.

A. M. Bell, Direct Examination.

A. M. BELL, for the plaintiff, testified:

My name is A. M. Bell. I am a member of the city council for Gainesville, Texas. I was elected in April, 1919, but I was out of the council two years. I was out in 1922 and 1923. The entire paving done by the Southern Construction Co. amounted to approximately between thirty-four and thirty-five thousand dollars. The brick paving was done in 1921 after the warrants had been issued to the Southern Construction Co.

A. M. Bell, Cross Examined by Mr. Weisberg.

The paving done by the Southern Construction Co. amounted to much more than thirty-five thousand dollars including the portion assessed against the lot owners. The city's portion would be about one-third including intersections.

A. M. Bell, Re-Direct Examination by Mr. Davis.

The blocks in Gainesville are generally two hundred feet in length—supposed to be. Of course, I never measured them, but that is what they are considered. The streets are sixty feet around the court house. We haven't got but one sixty foot street in Gainesville, and that is Broadway.

W. L. Blanton, Direct Examination.

W. L. BLANTON, for the plaintiff testified:

I was appointed city attorney of Gainesville on March 16th, 1921. At that time, they were just commencing to lay brick paving on the square. At that time, I don't think they laid any brick on Commerce street or on Dixon street. My office is on the west side of the square. Brick paving commenced in March, 1921, and was completed later in the year. The only paving done in 1920 was some tarvia on Dixon street north of the square and on Davis street which is in the south part of town. I don't know of any other paving that was done in 1920. I own some property on Davis street and I know that they put paving on that street. That was in 1920. The city's part of the paving done by the Southern Construction Co. amounted to something like thirty-four thousand six hundred and some odd dollars. The exact amount is stated in the petition. The engineer made a complete estimate. An engineer named Creiger was appointed by Mr. Head and Johnson Williams, the engineer for the City of Gainesville made a complete estimate of all the work done under this contract. That was the city's part of all the paving done by the Southern Construction Co. under the contract. The blocks around the public square are 200 feet square. All the old part of the town which was platted on forty acres of land, was laid out two hundred feet, and the streets are sixty feet. After that the new additions come in and they changed the number of lots in the blocks and also the streets are different widths. The new additions are irregular.

W. L. Blanton, Cross Examination by Mr. Heed.

The property owners were to pay three-fourths and the city one-fourth and that was to be approximately the difference. You would figure it out that way. The estimates against the property owners were evidenced by issuing a paving certificate by the city council. Against each owner, the engineer would make an estimate, what part of it and how much that property owner would owe, and the city would issue a certificate against it in favor of the construction company.

W. L. Blanton, Re-Direct Examination.

The city paved the intersections to the curb on each side. The streets between the curb are sixty feet throughout. Some of the sidewalks are ten feet and some of them are eight. The sidewalk reduces the paved part of the street to about forty feet. The city would pave sixty feet each way at the intersections.

W. L. Blanton, Cross Examination by Mr. Suggs.

The brick paving comprehended the square around the court house, and two streets extending from the square. That paving was done under Chapter 11, Title 22. The city did not adopt that until the last year I think. I wasn't in office when the street paving law was adopted. I was appointed city attorney March 16th, 1921, and the brick paving begun about that time. As soon as one block was completed, the engineer would make an estimate, and then they would issue those certificates against the property owners. I don't remember just when the Southern Construction Co. quit work.

Mr. Harry Levy notified—that is, he said in the council meeting that he was moving out—wasn't going to do any more work. I think that occurred sometime probably in October or November, 1921. I do not think any paving certificates were issued against the property owners after that. There was none issued that I know of. I think all certificates had been issued. I think these matters are of record in the minutes. About that time, the city attorney was ordered to make an investigation and to file suit.

W. L. Blanton, Cross Examination by Mr. Weisberg.

The attorney for the Construction Co. looked after the issuance of the certificates. I had nothing to do with it.

W. L. Blanton, Re-Cross Examination by Mr. Suggs.

I think Mr. Levy drew those paving certificates. That is just my opinion about it. I was representing the city. I didn't represent the paper holders.

W. L. Blanton, Second Re-Direct Examination by Mr. Davis.

It is my recollection that Harry Levy was before the council and stated he was going to move out. They did move out—moved all their machinery and never came back, and did no more paving after brick was laid on Dixon and Commerce streets and around the square.

W. L. Blanton, Re-Cross Examination by Mr. Weisburg.

The resolution of the council is, I think, dated September 21st, 1921, and that is when they closed up the matter and instructed the city attorney to file suit

to get this matter settled. They were moving out then. The injunction Judge Davis got out was for East California and Lindsay streets. That was only a part of the job. The big part was on the square. The work enjoined was a substantial part of the job. The big work was not on the streets covered by the injunction. East California and South Lindsay, I don't think, were to be brick. They hadn't determined whether it was to be brick or what material was to be put on it. It is my recollection that these streets were included in the contract. East California and Lindsay were not about all that remained to be done on the job. They could still go further up after the brick work was completed. The brick work was to go a certain distance, and after that, it was to be a different material and the same on Dixon. I don't know what proportion of the work these streets represented. The Levys didn't say they quit because of the injunction, but the work did stop after that. I don't remember whether the injunction was made perpetual. After the work was stopped, I paid no more attention to the injunction. My impression is that all these paving certificates issued against the property owners have been paid. I don't know about that. I didn't say positive whether they have or not.

W. L. Blanton, Second Re-Cross Examination by Mr. Suggs.

The streets upon which the paving was enjoined were subsequently paved. East California street was paved last year just recently. None of them were paved in a matter of months or less than a year after the in-

junction was issued. South Lindsay street was paved by the city. It was done I don't know how long after the injunction suit—a good long time though. I guess South Lindsay was paved in 1922. East California was paved last year.

W. L. Blanton, Re-Cross Examination by Mr. Head.

It was just my impression that the property owners paid the certificate issue against them. I didn't state positive whether they have been paid or not. I just got the impression most of them had paid.

W. L. Blanton, Third Re-Direct Examination by Mr. Davis.

The figures made by Bud Williams and Mr. Kreiger make the city's part of the entire paving $34,736.29. The correct amount was stated in the petition. This is the estimate made by the engineer and agreed to by Mr. Hayden Head and agreed to by the Levys. I don't know what California street was to be paved with. I don't remember upon what grounds the injunction was granted. The injunction was made perpetual and it was also made perpetual on South Lindsay street. It was in September when the resolution was introduced to make a settlement with the Levys; after that, Mr. Hayden Head came over there and the Levys and the council agreed with them that they could go ahead, and I think there was some agreement about Lindsay street, and if Mr. Head had lived I think he would have finished it and paved Lindsay street. He was talking about doing it. The city was willing to let them go anywhere, provided

they would do that $50,000.00 of paving. No agreement was made. They offered to do it but I don't know why the agreement wasn't carried out.

W. P. Springfield, Recalled by Plaintiff.

W. P. SPRINGFIELD, recalled by the plaintiff, testified:

I was present when the council of Gainesville passed the resolutions for the issuance of the paving warrants for the Southern Construction Co. The Levys were there and so was Mr. Blaine. I don't know Mr. Blaine's initials. Mr. Blaine did not live in Gainesville, and did not own any property there that I know of. Mr. Blaine was going to sell the warrants or was going to take them. He had something to do with that part of it, that is all I know. E. N. Blackburn was mayor at that time and was sick. When the council would adjourn after passing the resolution, Mr. Levy and Mr. Blain asked me to go over to Mr. Blackburn's house. They claimed that they would forget the street and how to get there, and I went over with them three or four times after the council would adjourn to get the mayor to sign the papers.

C. M. Buckingham, Direct Examination.

C. M. BUCKINGHAM, for the plaintiff, testified:

I was a member of the city council of Gainesville in 1920 and 21. I remember that there were about four resolutions passed in the fall of 1920 for the issuance of warrants to the Southern Construction Co. To the best

of my recollection, Mr. Blain was always right there in the council meeting, when the resolutions were passed. I suppose Mr. Blaine prepared the resolutions. I was not present when he prepared them, but he was there with them. I saw these resolutions in Mr. Blaine's hand. That is all I know. Mr. Blaine did not live in Gainesville, but was on hand when the resolutions were being passed. The paving had not been done as recited in the resolution. The public square was paved with brick in the early part of 1921. Commerce street was paved the same year, but later on. Dixon street was paved with brick the same year. At the time these resolutions were passed, the members of the council knew the work had not been done.

C. M. Buckingham, Cross Examination by Mr. Weisbert.

I was on the council at that time.

(Here, Mr. Weisberg showed to the witness the resolutions for the issuance of the warrants and the affidavits thereto attached signed by the mayor and each of the aldermen and the witness admitted that his signature to the affidavits as well as that of the mayor and other aldermen were genuine.)

C. M. Buckingham, Re-Direct Examination by Mr. Davis.

I don't know who prepared these resolutions. I don't know whether Mr. Blaine did or not. I don't remember at whose request I signed. I signed them as an alderman. I don't know what the resolutions con-

tain. I don't know what those things are, but whatever I signed was the adoption of the council and I signed as a member of the council.

Mr. Davis: One of these is a certificate made on the 24th day of April, 1920; of course, that has nothing to do with this deal. Take this resolution of the 5th day of October, 1920—that paper there.

A. Estimate No. 3. I don't know who prepared it. I don't know at whose request I signed it. I don't remember anything about it.

C. M. Buckingham, Cross Examination by Mr. Suggs.

If I remember correctly, it was Mr. Blaine who produced the resolution before the council. To the best of my recollection, the city attorney didn't fix it up. To the best of my recollection, the first time I saw those resolutions was when Mr. Blaine, whoever he was, appeared before the council and produced them before the council.

C. M. Buckingham, Re-Cross Examination by Mr. Weisberg.

Q. Mr. Buckingham, isn't it a fact that you and the council, whatever you signed, you signed it on the advice of your city attorney? A. Always, yes.

I don't remember what the resolution is. At the time I was familiar with it and now I am not. I have forgotten all about that. I have been out of the council four years, but at the time I was familiar with it, and whatever I signed, I thought it was all right. I am sure it was. I don't remember what warrants were issued.

C. M. Buckingham, 2nd Re-Direct Examination by Mr. Davis.

Oh, at that time, everything was read to us. We were familiar with what we were signing at that time. I don't remember what it was. The paving wasn't done until 1921. On October 5th, 1920, if there was any paving done at all, it couldn't have been anything more than just an excavation or something like that. There wasn't any paving until 1921.

By the Court: What I am trying to get at is what estimate of material is covered by this? A. I don't know, Judge; I don't know what that is.

Q. But you do say that whatever that relates to had been done? A. Evidently, yes, sir. We signed it.

By Mr. Davis:

At that time, I don't think I had seen or inspected any material. Let me see. The dates are confused in my mind. That says October 5th, 1920. I don't know.

C. M. Buckingham, 2nd Re-Cross Examination by Mr. Wiseberg.

Q. There was a time when there was considerable material on the ground, and it was later moved, wasn't it? A. Oh, that was later, on yes, sir.

(The plaintiff here rested.)

Defendants' Evidence.

Original Petition Introduced by Defendant, Head.

Defendant Head, over the objection of the plaintiff that it was immaterial and irrelevant, introduced the original petition filed in this cause and the judgment

rendered thereon and the appeal bond and the opinion of the court of civil appeals reversing and remanding the case as showing an election on the part of the City of Gainesville to hold the Southern Construction Co. for damages and thereby treat the warrants belonging to the Southern Construction Co. and not the City of Gainesville. To this, the plaintiff excepted and took this its bill.

The original petition was filed in the District Court of Cooke County, Texas on October 11, 1921, against H. W. Head, the Southern Surety Co. and Harry D Levy and Lester Levy, partners under the name of Southern Construction Co. The petition declared upon the two obligations executed by the defendant Head to the city, dated respectively on September 10th, 1920, and October 4th, 1920, the same as is contained in the third amended original petition and the obligation of the Southern Construction Co., and sought to recover of all the defendants the sum of $15000.00 as the difference between the paving done and the $50000.00 of warrants that had been issued, and sought to recover of the Southern Construction Co. for delay and extra expense of engineer, and to water furnished and other similar things. A default judgment was rendered on November 4th, 1921, in favor of the plaintiff against all the defendants for $15000.00, and against the Southern Construction Co. for $4090.00. The Southern Construction Co. and H. W. Head appealed from this judgment to the court of civil appeals,

executed an appeal bond in the sum of $500.00. This judgment was reversed as to H. W. Head and the Southern Surety Co. by the court of civil appeals as shown in *Head* v. *City of Gainesville,* 254 S. W. 323, but left undisturbed as to the Southern Construction Co., and the usual mandate was issued to the lower court accompanied by a certified copy of the opinion.

Certified Copy of Ordinance of December 16, 1919, Introduced by Brown-Crummer Investment Co.

The defendant, Brown-Crummer Investment Co. introduced a certified copy of the ordinance of December 16th, 1919, Book 6, page 574, authorizing the issuance of the warrants, in question, a true copy of which is attached to plaintiff's third amended original petition as Exhibit A and hereby referred to and made a part of this bill.

Resolution Providing for Issuance of Paving Warrants Offered by Brown-Crummer Investment Co.

Defendant Brown-Crummer Investment Co. next offered a resolution of April 16th, 1920, providing for the issuance of paving warrants 1, 2 and 3, recorded in Book 7, page 28, of the minutes of the City of Gainesville, and the affidavits thereto attached, but the resolution and affidavits are omitted as immaterial as these warrants have been paid and no question is made in reference thereto.

18.

The defendant, Brown-Crummer Investment Co. next offered a copy of the resolution of September

21st, 1920, directing the issuance of $10000.00 of paving warrants and the affidavits and certificates thereto attached, the contents of which are fully stated in this bill.

19.

The defendant, Brown-Crummer Investment Co. next introduced a certified copy of the resolution of October 5th, 1920, providing for the issuance of $17000.00 of paving warrants, and the certificates and affidavits thereto attached, the contents of which are more fully stated elsewhere in this bill.

20.

Defendant, Brown-Crummer Investment Co. next introduced a certified copy of the resolution of November 2nd, 1920, directing the issuance of $10000.00 of paving warrants and the affidavits thereto attached, the contents of which are fully stated in other parts of this bill.

21.

The defendant, Brown-Crummer Co. next introduced a certified copy of the resolution of November 16th, 1920, directing the issuance of $10000.00 of paving warrants and the affidavits and certificates thereto attached, the contents of all of which are elsewhere fully stated in this bill.

R. E. Crummer, Direct Examination.

R. E. CRUMMER, witness for the defendant, testified:

My name is R. E. Crummer. I live in Wichita, Kansas. I am vice president of the Brown-Crummer

Company, and was vice president in 1919, 1920 and 1921. I am the active head of the company. I approved the contract for the purchase of the warrants involved in this case. The transaction was handled under my supervision. The Brown-Crummer Investment Co. had an employee named J. E. Blaine. His duties principally were to report pending municipal issues of warrants and bonds throughout the state of Texas, and when an issue was submitted and met our approval, on specific authority, he could negotiate for our account. He did not have authority to close any contract without specific authority. I believe his employment ceased in the fall of 1920, probably September or October. I would guess September 1st. Judge W. M. Harris of Dallas was passing on this transaction for the Brown-Crummer Investment Co.

(Mr. Weisberg here handed the witness some papers and continuing, the witness said:)

This is a draft for $2850.00 covering the first $3000.00 installment of warrants, as presented, our check in payment of them, the approving opinion of Judge Harris, and the final delivery papers, including the approval of estimate by the city of that $3000.00 installment. The draft was drawn by H. W. Head on Brown-Crummer Investment Co. The other papers, certificates and affidavits were attached.

This other paper is a draft for $9500.00, drawn by H. W. Head on the Brown-Crummer Company, dated September 22nd, 1920, our cancelled check for $9500.00, dated September 27th, 1920, issued in payment of the

draft, Judge Harris' approving opinion covering the $10000.00 of warrants that were attached to the draft, and also the final delivery papers executed by the city, approving that $1000.00 installment of warrants. They were all attached together when the draft arrived in Wichita, Kansas, and the draft was presented and paid.

This is a draft for $16,150.00 drawn by H. W. Head on Brown-Crummer Company, our canceled check dated October 19, 1920, for $16,150.00, issued in payment of the draft, the approving opinion of Judge Harris covering the $17000.00 of warrants that were attached, together with the final delivery papers and approved estimate by the city officials relating to that installment of $17,000.00 of warrants, all of which were presented and paid. They were all attached, including the warrants, at the time they arrived in Wichita, Kansas.

This is a draft dated November 5, 1920, for $9500.00, drawn by H. W. Head on the Brown-Crummer Company, our check for $9500.00 canceled check, dated November 30, 1920, in payment of the draft, Judge Harris' approving opinion covering the $10000.00 of warrants that were attached, together with the final delivery papers, the approval of $10000.00 estimate by the city officials, all of which were presented at the time the draft was paid. All the papers were attached to the draft. The estimates and opinion would come directly from Judge Harris, but they were all attached finally when the draft was paid. The date of the above draft was November 5, 1920. This is our can-

celed check dated January 1st, 1921, for $9500.00, issued in payment of the final installment of the $10000.00 of warrants approved by Judge Harris' opinion, together with the final delivery papers executed by the city, which were presented with the last $10000.00 of warrants that were paid for. I seem to have misplaced the draft. It is the draft, I am quite positive, drawn by Mr. Head, as usual, but that draft has been misplaced. The check with which that was paid was attached to it and it is dated January 1st, 1921.

In case of each of these five drafts, I examined the papers attached at the time they reached Wichita, Kansas, and before actually paying the draft. I believed the recitations contained in the papers to be true and relied upon them. If I had known of any infirmities in any of these warrants, I would not have paid them. I have the warrants and coupons which are now owned by the Brown-Crummer Investment Co.

(Here, it was admitted that the past due warrants and coupons were as stated in Exhibit A to the pleadings of the Brown-Crummer Investment Co.)

The certified copies of the resolutions of September 21st, October 5th, November 2nd, and November 16th, produced by the witness Crummer, were certified to by S. A. Bryan, city secretary. These were typewritten with the exception of the blanks filled in with a pen. They are the originals of the carbon copies that were left with the council, and used by them. These resolutions were approved by the mayor upon

the day of their passage and were certified to by the city secretary on the same day, and to each were attached the affidavits made on the same day by the mayor, alderman and city secretary before a notary public, and the certificate dated upon the same day in reference to the signatures of the mayor, secretary and treasurer. In other words, everything in the matter of certificates, affidavits and the like bear the same date as the passage of the resolution. These resolutions and attached affidavits and certificates, are sufficiently described in the 7th paragraph of this bill. The affidavits of the mayor, secretary and aldermen said that the statements contained in the resolutions were true and correct, and that the materials so furnished and the work so performed and covered by the estimate or claim had been by the council inspected and accepted and found to be in accordance with the contract and plans and specifications, and had been determined by said council to be well worth the price agreed to be paid therefor as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants. To each of these transcripts was attached the certificate of W. M. Harris saying that he had examined the copy of the proceedings and the warrants and that in his opinion such proceedings show lawful authority and that he found the warrants to have been properly executed and that in his opinion the warrants were valid and legally binding upon the City of Gainesville.

R. E. Crummer, Cross Examination by Mr. Davis.

Mr. Blaine's initials are J. E. I have seen him since I have been here in Sherman. I think he is here now, probably in the court house. He was once connected with the Brown Crummer Company. His duties were to report on pending bond issues; to investigate and report for me on pending bond issues, also all municipal issues. My recollection is we were paying him $200 or $250 a month. I never paid him a commission according to my recollection. He had no other business except to represent us that I knew of while he was in my employ. I would estimate he was in our employ for a year. He negotiated for me the contract to purchase these warrants. Well, I wouldn't say that he looked after the warrants for me until the transaction was closed—not entirely so. I would say Judge Harris looked after the transaction until it was completed. Blaine got no commission from us that I know of. We paid ninety-five cents on the dollar for the warrants, and Blaine was entitled to no part of that discount. I expected that Mr. Blaine's assistance at any time he could render it, if asked, but the detail of this transaction, I think, was handled largely by Judge Harris at this end and myself in Wichita. Oh, yes, Blaine was the man that made the original contract. I don't know anything about Blaine being on hand looking after the city's business. Well, I think that he was familiar with the terms of the contract and the final delivery papers that were submitted. I had a copy of them. I had the contract with the warrants, you

understand, not the original contract for the improvement. I didn't know what was in the contract between the city and the construction company. I didn't know the details of the contract. I can't say that the expression, "Work performed and material furnished," struck me as somewhat peculiar. I presume the city officials prepared the resolution.

Q. Well, were you so suspicious that in addition to the certificate of the secretary that it was a true copy of the resolution, that you got the affidavits of the various aldermen? Why did you do that? A. We try to deal with these municipalities in an honorable, decent way, so that there will be no future controversies over it. We try to take every reasonable, ordinary safeguard that we can to satisfy ourselves that these obligations are issued for value and in good faith. Relying upon our attorney's advice, and these papers, I assumed that the city did have authority to issue the warrants without the engineer having made an estimate and certifying to it. I didn't know of Mr. Head's connection with this transaction until these warrants began to come through his bank with his signature attached to the draft. That did not strike me at all as peculiar. It didn't indicate that some string was tied to the warrants. That is very ordinary. It is ordinary for warrants to be issued in advance of the work done. Many times, warrants are issued and escrowed exactly as they were in this instance.

Q. What do you mean by escrowed? A. Delivered to either the depository of the city or to some mutually agreeable bank, and released as the estimates therefore are allowed by the city from time to time.

I would guess that Mr. Blaine was in my employ for six months to a year. I do not know who prepared these resolutions. I supposed the city prepared them or Judge Harris, our legal adviser. I don't know that Mr. Blaine was on hand when these resolutions were passed. To the best of my knowledge, Mr. Blaine ceased to be in our employ on September 1st, 1920. I fix that date, I believe, by letter heads that we had received about that date. The letters are in Wichita, Kansas.

R. E. Crummer, Cross Examination by Mr. Head.

It is C. J. Moore's signature to the paper you hand me. It is signed, Brown-Crummer Company, By C. J. Moore. Mr. Moore was a buyer. That letter is dated October 18th, 1920, and addressed to J. E. Blaine & Co. Blaine was not in our employ then (The witness was here handed another letter). That is my signature. It bears date November 12th, 1920, and reads this way: "H. W. Head, Esquire, care Merchants and Planters National Bank. Acknowledging receipt of your favor of the 6th inst. would advise that upon receipt of check covering past due coupons on the $10000.00 Gainesville warrants and the additional fee in accordance with supplemental agreement, your draft for $9500.00 will be honored. We are today writing Mr. Blaine, who is familiar with this transaction, as per

the enclosed copy." The Blaine here referred to is J. E. Blaine who was formerly in our employ.

The witness was here handed a letter dated Oct. 8th, 1920, addressed to J. E. Blaine, reading as follows:

"We have today had presented to us draft for $9500.00 drawn by H. W. Head covering $10000.00 Gainesville, Texas, street improvement six per cent warrants, this installment being accompanied with satisfactory proceedings and legal opinion. We will therefore honor the draft upon receipt of check covering the coupons detached from the $10000.00 warrants herewith enclosed, with additional underwriting fee as per the invoice enclosed. Kindly see that check for this amount is promptly forwarded to us, and upon its receipt the draft will be honored. We are also enclosing herewith $2000.00 of the funding warrants"—that is a different matter, I guess. This letter was signed, R. E. Crummer, Vice President. Blaine was not in our employ at this time. Mr. Blaine left our employ to go into the bond business himself, and was representing his own individual interest in buying and selling securities. This transaction, with which he was more or less familiar, had not yet been completed at the time he left our employ, so that a few of the final details, as indicated by these letters, had been referred to Mr. Blaine, and he didn't receive any commission or salary at that time. It was a matter of common courtesy. No, I won't say that this transaction was not completed and we were using Blaine for

the purpose of completing the transaction without paying him a salary.

The witness was here handed a letter dated November 12th, 1920, directed to H. W. Head, c/o Merchants and Planters National Bank, and signed by Brown-Crummer Co., reading:

"Acknowledging receipt of your favor of the 6th inst. would advise that upon receipt of check covering past due coupons on the $10000.00 Gainesville warrants and the additional fee in accordance with supplemental agreement, your draft for $9500.00 will be honored. We are today writing Mr. Blaine who is familiar with this transaction as per the inclosed copy."

Being handed another letter, dated December 3rd, 1920, addressed to H. W. Head, witness said: I dictated that letter. It is my letter. The letter reads: "Replying to your favor of the first inst. would advise that we have been refunded the amount of the detached coupons on your first installment of $10000.00 Gainesville warrants, and draft attached thereto in the sum of $9500.00 paid. We have assurances from Mr. Blaine that funds covering the second set of coupons will be forwarded to us at an early date, and promptly upon their receipt this draft will also be paid, which we trust will be satisfactory."

Continuing, the witness said:

In any matter of details that was referred to Mr. Blaine for three or four months after he left our employ, we relied on him to advise us. This man, Head,

who appeared in this transaction, I never met; I didn't know the man. Mr. Blaine did. When Mr. Head appeared in the transaction—he wasn't even a party to the contract originally—we had to refer such matters as an adjustment there at that end to someone at this point that knew who to talk to: and it seemed that Mr. Head at that time was the individual that had come in the contract. And that is why Mr. Blaine, at those stages, was referred to. When drafts came in with the name, H. W. Head attached, we very quickly assumed that the bank or Mr. Head personally was connected with this transaction, the detail of which I did not know.

The witness was here handed a letter addressed to H. W. Head, dated January 5th, 1921, saying:

"Replying to your letter of the 3rd, would advise that the last installment of the Gainesville, Texas, warrants was taken up yesterday. Just as a matter of record, and in order to complete our files, we would thank you to kindly advise us of your connection with this transaction." I recognize the signature of this letter as mine.

Here, Mr. Weisberg produced a letter dated January 7th, 1921, signed H. W. Head, and addressed to Brown-Crummer Co., Wichita, Kansas, saying:

"As a result of this delay in taking up my draft covering the last installment of the Gainesville, Texas, warrants, my account has been charged with forty days interest, amounting to $101.28. In view of the

very unreasonable delay, it is right that you should bear all or at least a substantial part of this expense. I think when you give it your consideration, you will recognize it as just that you pay all of the charge except such as would have accrued as a result of the payment of the item within the usual and customary time, say ten days at the outside. I will appreciate your check for the amount at your earliest convenience. You of course realize that during the delay you were getting the six per cent interest upon the warrants. My connection with the transaction is simply that I have advanced the Southern Construction Company, who is doing the work, an amount of money, as security for which I took an assignment of all that was to be paid to that company by the city and the citizens for the paving work done by it."

The reply of Brown-Crummer Co., to this letter of H. W. Head was dated January 12th, 1921, and says:

"We have yours of the 7th, concerning forty days interest, which you feel that we should pay, and in reply beg to state that there was some delay in the collection of these warrants, but considerable of it was not chargeable to us, inasmuch as we were unable to obtain payment of the coupons from the city. Upon receipt of the collection here, these coupons were detached and sent to Mr. Blaine of Dallas, according to our usual custom, and the mail was returned to us by the postmaster with the notation that Mr. Blaine was out of town. We afterward returned these to him, and found that we were unable to make delivery to him.

Later, on December, we mailed the coupons to the bank at Gainesville for collection, and received remittance on December 16th. We therefore believe that we should pay you interest on $10000.00 for the time intervening between December 16th and January 4th, the date of our payment of your draft, which would be nineteen days, at six per cent interest, or $31.67. We are enclosing herein our check for this amount, and trust that the same will be entirely satisfactory to you."

R. E. Crummer, Re-Cross Examination by Mr. Davis.

Mr. Davis, for the plaintiff here introduced the contract dated June 18th, 1920, between the city of Gainesville and the Brown-Crummer Investment Co.

Q. I see that the Brown-Crummer Company agreed to furnish the resolutions and things of that kind, and agreed to do the printing and to furnish the whole matter, in consideration of five per cent. Can you see now why Mr. Blaine was on hand with those resolutions?

A. Well, frankly; I don't know that Mr. Blaine was on hand. Briefly, we agreed to furnish the services of a competent attorney, and Judge Harris is the man we furnished, and his proceedings were adopted by the city in following out the usual performances in issuing these warrants.

R. E. Crummer, Re-Direct Examination by Mr. Weisberg.

The original contract to purchase these bonds was dated November 9th, 1919. The contract recites that

we will approve or disapprove within forty-five days from the date of the contract. The reason for the contract of June 18th, 1920, was because of the delay and the failure of the contractor from whom we originally purchased these warrants to deliver them within anything like the time specified in the original contract. The market had declined to an extent of probably ten per cent during that period, so that someone was obliged to assume a very great loss on account of the big market decline that took place from the date of that original contract up to about this period.

Over the objection of the plaintiff that it was self-serving and hearsay, the defendant, Brown-Crummer Co., here introduced a telegram from J. E. Blaine to Brown-Crummer Co., dated June 17th, 1920, saying: "Wire me here how much more discount we need on Gainesville warrants. Work commences right away in earnest. Would designate time of delivery on balance and some other points. Give me all suggestions you can." Signed, J. E. Blaine. And the reply of Brown-Crummer Co. to it dated June 18th, 1920, saying, "We should have at least five per cent reduction in price of Gainesville warrants to justify us in proceeding under our proposal made in November. Call attention to the provisions of construction contract reciting that work would be completed in one hundred and eighty working days. Under any new proposal we make, delivery should not be extended beyond one hundred days from today. What did they do at Gorman?"

To the admission of this telegram and letter, the plaintiff excepted and took this its bill.

Q. What, if anything does the name, J. E. Blaine & Co., have to do with whether Mr. Blaine was then in your employ or not, referring to the letter of October 8th, 1920, from Brown-Crummer Co., addressed to J. E. Blaine & Co.?

A. Well, Mr. Blaine organized his individual company under the name of J. E. Blaine on or about September 1st, 1920.

Q. J. E. Blaine & Co.?

A. Under the name of J. E. Blaine & Co., and was operating largely in his individual capacity at that time.

Q. Then, the name, J. E. Blaine & Co., indicates that Mr. Blaine was no longer in your employ at that time. Is that what you mean?

A. Yes, sir.

Blaine negotiated the contract for the purchase of the warrants from the Southern Construction Co. in November, 1919, under specific instructions from us. He had no authority to purchase warrants except upon specific authority in each specific transaction. He had no authority to change a contract without specific authority.

R. E. Crummer, 2nd Re-Cross Examination by Mr. Davis.

The contract of November 19th, 1919, for the purchase of the warrants for the Southern Construction Co., being here read, the witness said:

That is the original contract with the Levys, and the next contract with the city of Gainesville. It was my understanding that the city of Gainesville assumed some part of the responsibility for all this delay, and they were anxious to get us to continue our commitment with the Southern Construction Company, and offered us five per cent. We got a five per cent discount from the Levys and five per cent from the city. We first agreed to buy the bonds from the Southern Construction Co. on November, 1919, and then in June, 1920, we entered into a contract with the city of Gainesville, by which the city of Gainesville were to pay us five per cent for furnishing the resolutions and the printing and doing everything about it.

R. E. Crummer, 2nd Re-Direct Examination by Mr. Weisberg.

Blaine never did report to the Brown-Crummer Investment Co., that these warrants down here were being handled in any other manner than that outlined in the letters that have been introduced in evidence here.

(The Brown-Crummer Investment Co. here rested.)

Plaintiff's Rebuttal Evidence.

Plaintiff in rebuttal introduced the following evidence:

Agreement between the city of Gainesville and the Brown-Crummer Investment Co., as follows:

June 18th, 1920.

The State of Texas, County of Cooke.

This agreement made this the 18th day of June, 1920, by and pursuant to a motion authorizing the mayor of the city of Gainesville, Texas, to enter into a certain agreement in behalf of the city with the Brown-Crummer Investment Co., Wichita, Kansas, said motion appearing in full in the minutes of the proceedings of the city council of the date of June 18th, 1920, witnesseth:

That for and in consideration of the legal proceedings, furnished for the issuance by the city of Gainesville to the Southern Construction Company of warrants in payment for work and materials furnished in the performance of a certain contract for street improvements between the said city of Gainesville and said Southern Construction Co. and for the furnishing and printing of such warrants as well as all other matters incidental to the issuance of same—it being understood that said issue shall not exceed $50000.00 in amount—the city of Gainesville agrees to pay an amount equal to five per cent (5%) on all such warants issued. The above amount to be paid to the Brown-Crummer Co. as said warrants are taken up by said company.

It is further understood and agreed to between the parties hereto that said sum of 5% shall also apply as to a certain warrant for $3000.00 heretofore issued and taken up by the Brown-Cummer Co.

This agreement is contingent upon the entire issue or so much thereof as may be necessary to pay for work done or materials furnished by the Southern Construction Co. within one hundred (100) working days from the date of this agreement, working days to include all days except Sundays, holidays and days on which it is impossible to work on account of inclement weather the city engineer of Gainesville to be the sole judge of what shall constitue such days.

Witness our hand and seal this the 18th day of June, 1920.

City of Gainesville, Texas,
By E. N. Blackburn, Mayor.
The Brown-Crummer Investment Co.
Attest: By J. E. Blaine, Representative.
S. A. Bryan, City Sec'y.

Contract to Buy Warrants by Brown-Crummer Investment Co.

In this connection, Mr. Wiseberg passed up, and the plaintiff introduced the following contract:

November 19th, 1919.

To the Hon. Southern Construction Co.
Dallas, Texas.

Gentlemen:

For $50000.00 or more legally issued street paving warrants—bonds of City of Gainesville, delivered to us in Wichita, Kansas, dated December, 1919, and to mature 15 years from date, said warrants—bonds to be in the denomination of $500.00 bearing interest at the

rate of 6% per annum, payable semi-annually, both principal and interest payable at office of Brown-Crummer Co., Wichita, Kansas.

We Will Pay 95 cents on the dollar, we to pay for legal fees, printing of warrants and other expenses incident to the issuance of said warrants. These funds to be paid on estimate of City Engineer of City of Gainesville, Texas.

Provided that prior to the delivery of the above mentioned warrants—bonds to us we are to secure a full and complete certified transcript of the proceedings had incident to and in the issuance of the warrants—bonds that will evidence the legality of same to the satisfaction of our attorney.

We will approve or disapprove within 45 days.

Respectfully submitted,
The Brown-Crummer Investment Co.,
By J. E. Blaine.

Accepted, this the 19th day of November, 1919.
Southern Construction Company,
By Harry D. Levy.

Witness:

R. G. Carraway,
S. G. Donaldson.

Warrants Drawn by E. N. Blackburn, Mayor, and Signed by S. A. Bryan, City Secretary.

The plaintiff introduced five warrants drawn by E. N. Blackburn, mayor, and signed by S. A. Bryan, city secretary, one being for $850.00, dated October 5th, 1920, payable to J. E. Blaine, commission of 5% on estimates for $17000 to Brown-Crummer Co., and another for $500.00, dated October 5th, 1920, payable

to J. E. Blaine, fee in handling paving warrants, another for the sum of $500.00, dated November 2, 1920, payable to J. E. Blaine, commission on $10000.00 to Brown-Crummer Co., another for the sum of $150.00, dated 2nd day of July, 1920, payable to Brown-Crummer Co., 5% on $3000 warrants issued for paving, another for the sum of $500.00, dated September 21st. 1920, payable to Brown-Crummer Investment Co., 5% commission on $10000.00 warrants issued Estimate No. 2, and another for the sum of $500.00, dated November 16th, 1920, payable to J. E. Blaine, additional discount on warrants issued. All the warrants issued by J. E. Blain were endorsed by him and stamped paid, and all the warrants issued to Brown-Crummer Co. were endorsed by it and stamped paid.

That portion of the minutes of the city council at a called session on June 18th, 1920, saying:

"Alderman Buckingham made a motion that the Brown-Crummer Co. be allowed five per cent on the $50000.00 warrant issued or such part as may be used on a 100 day working basis. Motion was carried by a unanimous vote

"Alderman Robbins made a motion that the mayor and secretary be authorized to enter into a contract with the Brown-Crummer Co. Motion carried."

Letter—Harris, McCall & Graham to S. A. Bryan.

Plaintiff introduced a letter dated December 15th, 1919, from Harris, McCall & Graham to S. A. Bryan, as follows:

"You will please find enclosed proceedings to be used by the city council in the passage of an ordinance confirming the contract of the City of Gainesville and the Southern Construction Company, providing for the issuance of interest bearing warrants in payment therefor.

This should be passed at your regular meeting and it is important that the full membership of the city council be present. If this is impossible, we can perhaps approve the ordinance with less than the full membership present. When the ordinance has been passed and entered in your minutes please properly certify the copy we are furnishing and return it to us for use in approving the warrants, and as a permanent record to be retained by the purchasers.

We are not sending the proceedings for your funding issue and the ordinance requested apportioning your tax rate for the present year, but will do that within the next few days. It is important that the contract ordinance be passed now."

And a letter from Harris, McCall & Graham to J. E. Blaine, dated January 2nd, 1920, as follows:

"Your attention is called to two corrections which should be made in the Minutes of the City Council of the City of Gainesville, with reference to the passage of the ordinance confirming the contract between the City of Gainesville and the Southern Construction Company for the construction of certain street improvements in the City of Gainesville.

The certified copy returned to us shows two inadvertent errors which they may correct in their original proceedings, and we are already taking the liberty of correcting the copy sent to us, to-wit:

1. The paragraph immediately following the table of maturities provided in the ordinance, should read as follows:

'Said warrants shall bear interest at the rate of six per cent (6%) per annum from date until paid, interest payable March 1st, 1920, and semi-annually thereafter on the 1st day of September and on the first day of March of each year; which interest is a part of the contract price agreed to between the parties, principal and interest on said warrants shall be payable at the office of the Brown-Crummer Investment Co., Wichita, Kansas.'

You will note that the copy furnished us omits the following clause:

'Which interest is a part of the contract price agreed to herein.'

A. The copy furnished us shows that a tax levy of eight cents per annum was levied. The figure eight is a typographical error and should read nine cents.

We have made these corrections in our copy and trust that you will see that the same errors do not occur in the original record.

If you have not furnished the Brown-Crummer Company with the written signatures of the Mayor and City Secretary, please do so at once."

And also a letter from J. E. Blaine to S. A. Bryan, dated, Wichita, Kansas, January 8th, 1920, as follows:

"I am handing you herewith letter received from Harris, McCall & Graham, which is practically self-explanatory.

Won't you please look at your original record on the minutes and be sure that the corrections enumerated are made, and advise me.

Please change my address to P. O. Box 745, as the fire in the North Texas Bldg. a few days ago put us completely out of business."

And also a letter from Brown-Crummer Investment Co., By J. E. Blaine to S. A. Bryan, dated, Wichita, Kansas, January 8th, 1920, as follows:

"Am enclosing herewith estimate No. 1 for Levy & Levy which I will thank you to give to them.

Am mailing same to you on account of there being no one in their office and I was not sure at what time they would be ready to use this."

And also a letter from Harris, McCall & Graham, to J. E. Blaine, dated January 8th, 1920, as follows:

"You will please find enclosed, the proceedings which may properly be passed by the City Council of Gainesville, Texas, in approving the first estimate of Messrs. Levy and Levy for the paving work they have contracted to do in the City of Gainesville. Attached to the resolution to be passed by the council you will find the delivery papers to be executed by the proper officials accompanying the first installment of warrants.

The proceedings and delivery papers, when properly executed, should be attached to Warrant No. 1, and submitted to us for approval. The remaining warrants received in payment for estimate No. 1 may be attached to the draft of Messrs. Levy & Levy and forwarded to the American State Bank, Wichita, Kansas. The draft will be paid by the Brown-Crummer Company as soon as we have wired the company that the first installment of warrants has been approved."

Also a letter from J. E. Blaine to S. A. Bryan, dated April 7th, 1920, as follows:

"Herewith papers in the funding issue which you will need to have changed or have Mr. Garmany sign the warrants. I trust he will be able to do the latter.

Don't forget to give the amounts and issues of the Liberty Bonds on hand."

Also a letter from R. E. Crummer, Vice President to the City Treasurer of Gainesville, dated September 27th, 1920, as follows:

"We have today taken up from the Southern Construction Company, the $10000.00 City of Gainesville warrants numbers 41 to 50 inclusive, awarded on your recent estimate, and therefore enclose herewith statement covering the matured coupons detached therefrom, together with the 5% fee according to the supplementary agreement of June 18th, 1920, making a balance due us of $966.70 for which amount we will thank you to kindly remit us your check by early mail, and greatly oblige."

And also a letter, dated September 29th, 1920, from R. E. Crummer, Vice President, to City Treasurer, Gainesville, Texas, as follows:

"We have today received from Mr. Blaine check for $500.00 covering concession due on the recent $10000.00 installment delivered us which would therefore leave the amount of your remittance to cover only the coupons mailed you yesterday, for which we shall hope to receive your check at any early date."

Treasury Warrants Payable to J. E. Blaine and Brown-Crummer Co.

The plaintiff introduced a treasury warrant dated on the 5th day of October, 1920, payable to J. E. Blaine for $850.00, 5% commission on estimate for $17,000 for Brown-Crummer Co. This warrant was signed, E. N. Blackburn, mayor, S. A. Bryan secretary, and it was endorsed and paid.

Next, a warrant for $500.00 signed in the same way, payable to J. E. Blaine, dated October 5th, 1920, and endorsed by J. E. Blaine, and marked paid;

And next, a warrant for $500.00, signed in the same way, dated November 2nd, 1920, payable to J. E. Blaine, concession on $10000.00 warrants to Brown-Crummer Co. This warrant is endorsed and marked paid.

Next, a warrant for $150.00 signed in the same way, dated July 2nd, 1920, payable to Brown-Crummer Co., five per cent on $3000.00 warrants, issued for paving.

Next, a warrant dated September 21st, 1920, signed in the same way, payable to Brown-Crummer Co. for $500.00, discount on $10000.00 warrants issued on estimate No. 2, and next, a warrant for $500.00 signed in the same way, payable to J. E. Blaine, additional discount on warrants issued. And a warrant for $500.00 dated Oct. 5, 1920, signed in the same way payable to J. E. Blaine, fee in handling paving warrants, endorsed and stamped paid.

Lee Lewis, Direct Examination.

LEE LEWIS, for the plaintiff, testified:

My name is Lee Lewis. I live in Gainesville. I think I was a member of the city council in 1920—about that time, or 1921. I was a member of the council at the time the resolutions were passed for issuing paving warrants to the Southern Construction Co. The council met at night, at about 7:30 p. m. I knew Mr. Blaine. He was before the council. Well, he negotiated this warrant deal for the Southern Construction Co. and the city, I believe—was my understanding.

Q. Who furnished the resolutions that were passed? A. Well, the Brown-Crummer Co.—the contract that we had with them, that they should furnish all resolutions necessary to preparing the warrants for sale, and all we had to do was to pass on them. Well, I suppose Mr. Blaine brought the resolution to the council. Mr. Blaine was there. When the resolutions were passed for the $3000.00 and the $17000.00 and

the $10000.00 bond issue, all the paving had not been done. The brick paving had not been done. Well, the reason the warrants were issued in advance of the work, according to the contract, they were to be delivered at a certain time and sold at a certain price, under the contract with the Southern Construction Co. and that time had expired on account of rain beyond the control of the Brown-Crummer Co. and the City of Gainesville and it was necessary to an extension of time, and we were advised by the city attorney, Mr. Adams, that those warrants could be issued—and by Hayden W. Head, at Sherman—that those warrants could be issued and could be delivered at the proper time and they were issued at that time by the city council and were supposed to be held by Mr. Head. They were to be placed in escrow by Mr. Head. Mr. Blaine certainly should have known about it. He was there. He knew what paving had been done. It is not my understanding that the warrants should be turned over to the Southern Construction Co. They were not entitled to the warrants. They were to be held in escrow. Mr. Head was supposed to be responsible for those warrants as well as the surety company bond back of them. All the council should have known at that time of the passage of those resolutions the work hadn't been done. I knew it.

The Court: Let me be sure that I understand you. These bonds were to be placed in escrow with Mr. Head?

A. Yes, sir.

I think it was the intention to deliver the warrants as the work progressed. However, the city attorney advised that they ought to be issued as such had been done in different cases. The plan was to deliver the warrants as the work progressed and certificates were given by the council and engineer that the work had been done. We signed quite a lot of instruments that were presented to us. I am not sure that the certificates were signed at the time of the delivery of the warrants or before then. All the resolutions were passed at night if I remember right. Sometimes we had meetings in the day time, but I don't think we considered any paving.

Q. I see there was a certified copy made at the same time the resolution was passed. Now, who furnished that copy to the secretary? A. I don't know.

Well, I wouldn't be positive that Mr. Blaine was there that night. He was there a number of times, when these different ones were passed. I couldn't say positive that he was there at that time.

Q. I see on the same date, on October 5th, 1920, all of them signed an affidavit made before Frank Morris. Did you ever read that affidavit? A. I didn't read it. No. I wouldn't be positive that I signed the affidavit. I was under the impression that it was passed at the meeting and presented the next meeting for signature. Frank Morris presented it. However, most of them were signed at the city council. Frank Morris brought the affidavit to me. I don't remember whether the resolution of October 5th, 1920, was really

read to the council. I presume it was. Some of them were read. When Mr. Blaine was up there, he was at the council meeting as usual. Blaine did not carry the papers around himself to have them signed up, but he was there at Gainesville at the time.

Q. On the 2nd day of November, 1920, a resolution was passed for the issuance of $10000.00 of warrants. A copy of it was certified to on the 2nd day of November and there is attached an affidavit signed by all the aldermen on the 2nd day of November. Now how was that work done so rapidly as all that? You met at night. A. Ben Thomason was at the council meeting, I think, in that instance.

Q. You had a notary down there at night waiting? A. Yes, sir. That was usually the case. I can't say whether Mayor Blackburn was there or not, but they took it to the house, I guess, if he wasn't. The resolution says he was there so he ought to have been there.

Lee Lewis, Cross Examined by Mr. Weisberg.

At night was the regular time for the meeting of the council. The regular meeting was always held at night unless there was a called session. We had enough light to see what the papers were.

Q. Mr. Lewis, it is a fact, isn't it, that there was for a time a lot of material on hand, wasn't there, that later was moved away? A. Yes, sir, that's a fact.

Lee Lewis, Re-Direct Examination by Mr. Davis.

Q. The material was later moved away? A. Yes, sir, I think so.

Q. What material was moved away from there? A. Well, they had a lot of cement, supposed to have, in the court house, and it was shipped to Sherman.

Q. Did you ever see the cement? A. I didn't, but the city engineer told me they moved it away.

W. P. Springfield, 2nd Recall by Plaintiff.

W. P. SPRINGFIELD, recalled by the plaintiff, testified:

When the Levys quit, they had no cement on hand that I know of. They had some clay brick, but no acceptable paving brick that I saw. The Levys had no cement at the beginning. To start with, I bought what I could get from lumber yards at three different towns. I was street commissioner and bought the cement. I finally got pay for it. I liked not to have got it though. They gave me bogus checks all the time for it. The checks would be turned down. Yes, sir. They give me checks on banks that they never had done any business with.

W. P. Springfield Cross Examination by Mr. Weisberg.

I got my money from the Levys.

W. P. Springfield, Re-Direct Examination by Mr. Davis.

I finally got payment for the cement.

W. P. Springfield, Re-Cross Examination by Mr. Weisberg.

I was not a member of the city council. I was just an employee.

(This closed the testimony.)

Requested Charges by Plaintiff.

At the close of the evidence, the plaintiff, City of Gainesville, presented to the court in writing, separately, each of the following requested charges:

1. The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the consent of the qualified voters of the City of Gainesville granted at an election held for that purpose.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

2. The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

3. Under Section 28, Art. 2 of the Charter of the City of Gainesville, contracts are required to be let to the lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects

after the bids were received, without being re-opened to competitive bidding as changed, is void.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

4. The warrants issued by the City of Gainesville to the Southern Construction Company are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

5. Under the Charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

6. The instructions to bidders in the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

7. The unquestioned proof shows that the City of Gainesville received no consideration for $15263.73 of the series of $50,000.00 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectable.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
Attorneys for Plaintiff.

8. In the acquisition of the warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants, applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired

such bonds, if at all, subject to all the defenses the City of Gainesville had against them.

W. L. Blanton,
W. O. Davis,
Cecil Murphy,
Attorneys for Plaintiff.

9. If J. E. Blaine was the agent of Brown-Crummer Co. in the purchase of the warrants in question and during said agency and before Brown-Crummer Co. received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same.

W. L. Blanton,
W. O. Davis,
Cecil Murphy,
Attorneys for Plaintiff.

10. If the evidence shows that J. E. Blaine was the agent of the Brown-Crummer Company you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions,

then you are instructed that this was sufficient to constitute him an agent.

W. L. Blanton,
W. O. Davis,
Cecil Murphy,
Attorneys for Plaintiff.

11. It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case, by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company.

W. O. Davis,
W. L. Blanton,
Cecil Murphy,
Attorneys for Plaintiff.

12. The contract for the paving and the ordinances under which it was made prescribe that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of eight per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply

with the charter in these respects renders the contract and all proceedings thereunder void.

W. O. Davis,
W. L. Blanton,
Cecil Murphy,
Attorneys for Plaintiff.

The court, after close of the evidence and before the retirement of the jury, refused each of the above requested charges, and the city of Gainesville duly excepted.

After the close of the evidence and before the retirement of the jury, the plaintiff, the city of Gainesville orally requested the court to give the following charge:

The contract between the city of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

The above instruction, the court in like manner refused to give to which the plaintiff duly excepted.

Charge of the Court.

Upon the conclusion of the evidence, the court give to the jury the following written charge:

Gentlemen of the Jury:

This suit by the city of Gainesville involves a controversy arising from a contract executed by the council of said city for the improvement of its streets. Warrants were issued by the city to the extent of fifty

thousand dollars in payment of its part of said improvements. The testimony shows that some of the warrants were issued before all of the work had been completed, and that the value of the work actually performed is less, to the extent of about fifteen thousand dollars, than the face value of the warrants.

The warrants in question were delivered to Mr. H. W. Head by virtue of an arrangement that contemplated the execution by him of an obligation, duly secured, which, among other things, provided that the proceeds would not be paid to the contractors except in such amounts as the mayor of the city should attest to be due. Judgment is asked against the estate of Mr. Head and against his surety, on the claim that the warrants were improperly or improvidently delivered.

The warrants referred to were purchased in good faith by the Brown-Crummer Investment Company, who have also been made parties to this suit; and judgment is asked against that concern also that the warrants, for reasons set out in the pleadings, and to the extent of forty-seven thousand dollars, be held invalid and to constitute no binding obligation against the city.

The evidence shows, in my opinion, that the city council had authority, under its charter, to execute the contract in question, and likewise to place the warrants with Mr. Head under the conditions disclosed by the evidence. It is my idea that the conditions of the obligation assumed by him have been discharged—

that is, certificates, over the signature of the mayor of the city, attesting that work was done by the contractors of the value of said warrants, were furnished him.

In this state of affairs, I do not think judgment can properly be rendered against his estate herein. Then I think too, that the city, under all the circumstances, is estopped from claiming, as against the Brown-Crummer Company, that the warrants in question are invalid. It is true, full value does not appear to have been received; but it is an instance where those delegated with authority to perform acts for the city have caused the issuance of the warrants in question and the purchase of them by parties who acted in good faith, and, for a valuable consideration.

There is therefore no issue of fact for you to settle. The city, as a matter of law, it seems to me, can be held responsible for the obligations, and is not entitled to a judgment in this case. You are therefore directed to return a verdict in the form hereto attached.

W. L. Estes,
Judge.

Exceptions to Charge of the Court by Plaintiff.

The plaintiff, the city of Gainesville, upon the reading of said charge and before the retirement of the jury, excepted to that portion of the charge instructing a verdict in favor of the defendant, Head, and the Southern Surety Company, and also to that portion of the charge directing a verdict against the city of

Gainesville in favor of the Brown-Crummer Investment Co., and also excepted to the instruction to the effect that the Brown-Crummer Investment Co., were bona fide purchasers and that the city was estopped against them, for there is ample proof to carry the case to the jury showing that J. E. Blaine was the agent of the Brown-Crummer Investment Co., in the transaction and had full knowledge that the warrants were issued without consideration and before a report of the engineer and the doing of the paving. The plaintiff also excepted to that portion of the instructions that directs the jury to return a verdict in favor of the Brown-Crummer Investment Co., each of which exceptions and objections was overruled by the court and the plaintiff duly excepted.

Order Approving Bill of Exceptions.

This bill together with the additions and qualifications attached hereto contains all of the evidence produced upon the trial and the plaintiff asks that the same be approved, certified and made a part of the record.

In order that all the matters aforesaid may be made of record, I, W. L. Estes, district judge, before whom said cause was tried, do hereby sign and seal this bill of exception on this the 28th day of June, 1926.

W. L. Estes,
Judge of the United States District Court for the Eastern District of Texas.

Additions and Qualifications to Bill of Exceptions by the Court.

In the District Court of the United States,
Eastern District of Texas,
Sherman Division.

No. B. L. 241.

City of Gainesville, Plaintiff.

vs.

Southern Construction Company, et al., Defendants.

This is to certify that the attached bill of exception is signed and sealed by me, with the following qualifications and additions, which are made a part of said bill of exception, the same as if fully and at large set out therein:

The charter of the city of Gainesville referred to in the bill of exception also contains the following provisions:

Article 2, of Section 1, of said charter, provides that the city of Gainesville "may contract and be contracted with."

Section 3, of Article 2, of said city charter, reads as follows:

"Sec. 3. *Powers of Ordinance.* The city of Gainesville shall have power to enact and enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants, to protect lives, health and property of the inhabitants of said city, and to enact and enforce any and all

ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this act; and provided further, that the specifications of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant to and bestow upon the inhabitants of the city of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas."

Article 2, Section 5, of said city charter reads as follows:

"Sec. 5. *Street Power and Service.* The city of Gainesville shall have and exercise exclusive power and control over the streets, avenues, alleys, highways, crossings and public grounds within the city, and the council shall have power to abate and remove all encroachments and obstructions thereon; to open, alter, abolish, widen, extend, establish, regulate, grade, pave, macadamize, drain, clean or otherwise improve said streets, avenues, alleys, highways, crossings, etc., and to protect the same from all encroachment and injury of every kind whatsoever."

Section 1, of Article 3, of said city charter authorizes the city council to levy annually for general purposes and for paying bonded indebtedness, *ad*

valorem taxes on all real, personal and mixed property within the territorial limits of said city.

Article 7, Section 10, of said city charter, also contains the following provision:

"A special session (of the city council) may be called by a majority of the members of the city council whenever they deem it expedient to do so, and it is hereby declared to be the duty of every member of the city council to attend such special session as may be called."

The resolution passed by the city council of Gainesville on December 16, 1919, was recorded in Book 7, pages 38, *et seq.*, of the minutes of said city council, and is in terms and language as follows:

City Hall
City of Gainesville, Texas.
December 16th, 1919.

The city council of the city of Gainesville, Texas, met in regular session, at the city hall, in said city, on this the 16th day of December, A. D. 1919,

Present:

E. N. Blackburn, Mayor,
Geo. A. Beck,
J. A. Thomas,
J. E. Bramble,
C. M. Buckingham,
W. B. Nowell,
Lee Lewis,
J. W. Puckett, Alderman,
R. L. Kendall,
R. G. Barrett,
T. F. Robbins, and
S. A. Bryan, City Secretary,

Absent: None,

a quorum was announced present, when the following proceedings, among others, were had, to-wit:

The mayor presented to the council, for consideration and passage, an ordinance entitled— "An ordinance confirming contract between the city of Gainesville and the Southern Construction Company, a copartnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the city of Gainesville, Texas, in accordance with proposal of contractor and plans signed by both parties thereto and made part thereof; providing for the issuance of city of Gainesville street improvement warrants as evidence of the city's debt therefor: Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity: And declaring an emergency."

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be read in full, motion carried and the ordinance was read by the secretary.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance pass its first reading.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the rule requiring ordinances to be passed at three several meetings of the city council be suspended and that said ordinance pass its second and final readings by caption.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Said ordinance was read second time, by caption, and passed by the following vote:

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that said ordinance be placed upon its third and final passage.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be finally passed.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

The ordinance as follows:

"An ordinance confirming contract between the City of Gainesville and the Southern Construction Company, a co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and

for the city of Gainesville, Texas, in accordance with proposal of contractor and plans signed by both parties thereto and make part thereof: Providing for the issuance of City of Gainesville Street Improvement warrants as evidence of the city's debt therefor: Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity; and declaring an emergency."

Whereas, the city council of the City of Gainesville, Texas, has heretofore determined the necessity for the construction of certain street improvements and the city council, and the City of Gainesville, pursuant there to, on the 20th day of November, 1919, acting by and through its mayor and city secretary and the said Southern Construction Company, a co-partnership, contractor, entered into contract for the construction of said street improvements in accordance with plans, specifications, and proposal which are attached to and form a part of said contract, which is in words and figures as follows, to-wit:

Proposal.

To the City of Gainesville, Texas.

Gentlemen:

Pursuant to the foregoing instructions to the bidders the undersigned bidder proposes to do all the work, furnish all the material upon which he bids, as provided by the attached plans and specifications, and binds himself on acceptance of his proposal to execute a con-

tract and bond, according to the attached forms, for the performance and completion of the said work in the time specified.

Items	Written Price	Figures
Price per sq. yd. for 3'' Vertical Fiber Brick pavement complete on a 5'' concrete foundation	Three and 40/100 Dollars,	$ 3.40
Price per sq. yd. for 3'' Vertical Fiber Brick pavement complete on a 4'' concrete foundation	Three and 20/100 Dollars,	$ 3.20
Price per sq. yd. for 2½'' Vertical Fiber Brick pavement complete on a 5'' concrete foundation	Three and 25/100 Dollars,	3.25
Price per sq. yd. for 2½'' Vertical Fiber Brick		

pavement complete on a 4'' concrete foundation	Three and 05/100 Dollars,	3.05
Price per sq. yd. for Tarvia treatment pavement complete on a 6'' gravel foundation	One and 23/100 Dollars,	1.23
Price per lin. ft. for stone concrete comb. Curb and Gutter	Eighty Cents	.80
Price per lin. ft. for gravel concrete comb. Curb and Gutter	Seventy Five Cents	.75
Price per lin. ft. for stone concrete comb. Curb and Gutter	Eighty Cents	.80
Price per lin. ft. for gravel concrete separate Curb	Fifty Five Cents	.55
Price per lin. ft. for stone concrete separate Curb	Sixty Eight Cents	.68
Price per lin. ft. for gravel concrete separate Gutter	Forty Eight Cents	.48
Price per lin. ft. for stone concrete separate Gutter	Fifty Seven Cents	.57

Price per lin. ft. for stone separate Curb	Forty Five Cents	.45
Price per lin. ft. for oak headers in place	Fifty Cents	.50
Price per cu. yd. for concrete in culverts, etc.	Eighteen Dollars	18.00
Price per lb. for reinforcing steel in Culverts, etc.	Thirty Five Cents	.35
Price per cu. yd. for Earth excavation	Seventy Five Cents	.75
Price per cu. yd. for Rock excavation	Three Dollars	3.00
Price per cu. yd. for Over-haul per 100 ft.	Two Cents	.02
Price per pound for Culvert plates	Twenty Five Cents	.25
Price each for Catch Basins complete in place	Fifty Five Dollars	55.00
Price per sq. ft. for four inch cement walk	Twenty Three Cents	.23
Cost per day for common Labor on extra work	Four Dollars	4.00
Cost per day for team labor on extra work	Seven dollars	7.00

The undersigned bidder agrees to accept deferred payments on contracts with property owners in one (1) and two (2) years, and to charge interest on the same at the rate of eight (8) per annum.

The undersigned bidder agrees to complete the work upon which he has bid, within one hundred eighty (180) working days, from acceptance of his bond by the city.

Southern Construction Company
By Harry D. Levy,
Dallas, Texas.

Contract.

The State of Texas, County of Cooke.

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the City of Gainesville, Cooke County, Texas, party of the first part, hereinafter called the city, and the Southern Construction Company, of Dallas, Texas, party of the second part, hereinafter called the contractor.

Witnesseth: That for in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to commence and complete the construction of certain street improvements and all extra work in connection therewith as stated in the general specifications, and at his own proper cost and expense

to furnish all tools, materials, machinery, labor, supervision and other accessories necessary for the said construction in accordance with the conditions and prices stated in the proposal attached hereto, and in accordance with the plans and specifications therefor as signed by the parties hereto, all of which are made a part hereof, and all in the manner and under the conditions hereinafter specified:

All the provisions of this agreement shall be performed in the City of Gainesville, Texas, and any suit to enforce its provisions or for damage for breach thereof shall be brought in Cooke County, Texas.

In witness whereof, the city has caused its seal to be hereto affixed, and these presents to be signed by its mayor and attested by its city secretary, and the party of the second part have hereto set their hands and seal on the day, month and year first above mentioned.

The City of Gainesville,
Texas.
Party of the first part.
By E. N. Blackburn, Mayor.
The Southern Construction
Company.
Party of the second part.
By Harry D. Levy.

Attest:

S. A. Bryan
City Secretary.

Witness:

R. G. Carraway.

Supplemental Contract.

The State of Texas, County of Cooke.

Know all men by these Presents:

That, whereas, under date November 20th, 1919, a contract was made by and between the City of Gainesville, Cooke County, Texas, and the Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy, of the State of Texas and County of Dallas, providing for certain street improvements to be made by said Southern Construction Company for said City of Gainesville, which contract is duly of record in the minutes of the city council; and

Whereas, on the same date a supplemental contract was made by and between said parties, authorizing a modification of the provisions for a bond in said contract, which supplemental contract is also duly of record in the minutes of said city council; and

Whereas, said contract provides for payments to be made in money by said City of Gainesville for said labor, materials and supervision; and

Whereas, it now appears to all parties that the City of Gainesville will not have funds in money available for said purpose, as payments shall become due:

Now, therefore, for and in consideration of the extension of the maturities in the payments for said labor, materials and supervision, the said city hereby agrees to issue in payment for said labor, materials and supervision interest bearing warrants, to be designated "City of Gainesville Street Improvement Warrants,

Series ....," to be dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, interest payable semi-annually on such dates as may be found advisable by said city, maturing serially in approximately one (1) to twenty (20) years; and

Whereas, in consideration of the interest to be paid on said warrants, which is hereby made a part of the contract price, the Southern Construction Company has agreed to accept said warrants in payment for said labor, materials and supervision, said warrants to be issued upon the completion of said contract or upon legally approved estimates.

Now, therefore, it is hereby agreed that the payments under the terms of this contract shall be made as herein specified and said city through its duly authorized officials, binds itself to issue legal warrants for said purpose.

In witness whereof, we have hereunto set our hands and seals this the 20th day of November, 1919. Executed in duplicate.

The City of Gainesville, Texas.
By E. N. Blackburn, Mayor.
The Southern Construction Company,
By Harry D. Levy,
Lester Levy.

Attest:

S. A. Bryan,
City Secretary.

And, Whereas, said contract, and supplements thereto is based upon specifications prepared and submitted to and approved by the Mayor and City

Council, and was let and entered into after proper advertisement inviting competitive bids for the work proposed to be done, which advertisement is as follows:

Notice to Paving Contractors.

Sealed bids will be received until 8:00 p. m. November 18th, 1919, by S. A. Bryan, Secretary of the City of Gainesville, Texas, for furnishing all material and labor for the construction of approximately 31,000 square yards of street paving, 10,000 lineal feet Curb and Gutter. A certified check for the sum of $1000.00 payable to the order of Hon. E. N. Blackburn, Mayor, must accompany each bid. Plans and specifications may be obtained at the office of the engineer R. G. Carraway Company, Gainesville, Texas, upon a deposit of $10.00. The city of Gainesville, Texas, reserves the right to reject any or all bids and to waive formalities.

Which said advertisement appeared in the Daily and Weekly Hesperian, a daily newspaper published in said said City of Gainesville, in the issues of the 6th day of November, 1919, to the 16th day of November, 1919, in not less than ten issues; and

Whereas, all bids submitted were sealed and opened in the presence of a majority of the Aldermen, and did remain on file in the Mayors Office open for public inspection at least forty eight hours before said contract was awarded to the successful bidder, and in said advertisement the City reserved the right to reject any and all bids and pending the advertisement of the work and contract proposed specifications therefor did

remain on file in the Office of the Mayor subject to inspection of all parties desiring to bid:

Whereas, said Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy of the County of Dallas, State of Texas, have given a bond in accordance with Section 29 of the Charter of said City securing the faithful performance of said contract and securing the rights of subcontractors, materialmen and laborers.

And Whereas, said contract has been read and duly considered and understood;

Therefore, be it ordained by the City Council of the City of Gainesville, Texas:

That said contract be and the same is hereby in all things approved, ratified and confirmed as the act and contract of this Council and of the City of Gainesville, Texas, and the same shall have effect according to its tenor and purport; and it being agreeable to the parties signing said contract that payment for said street improvements be made by the issuance of six per cent (6%) interest bearing street improvement warrants, maturing one (1) to Twenty (20) years, which warrants the City of Gainesville has agreed to issue, and the said Southern Construction Company, Contractor, has agreed to accept in payment therefor;

Therefore, It Is Further Ordained that in accordance with said contract and agreement, warrants of the City of Gainesville to be called "City of Gainesville Street Improvement Warrants, Series ....," be issued in the sum of Fifty Thousand ($50,000.00)

Dollars, payable to the said Southern Construction Company, Contractor, their assigns or bearer, evidencing the indebtedness due said Contractor by the City of Gainesville, under and by virtue of said contract.

Said warrants shall be numbered from one (1) to fifty (50) inclusive, shall be in the denomination of One Thousand ($1,000.00) Dollars each, aggregating Fifty Thousand ($50,000.00) Dollars, shall be dated November 20th, 1919, and shall become due and payable as follows, to-wit:

Warrant Numbers	Maturity Dates	Amount
1 & 2	March 1, 1921	$2000.00
3 & 4	March 1, 1922	2000.00
5 & 6	March 1, 1923	2000.00
7 & 8	March 1, 1924	2000.00
9 & 10	March 1, 1925	2000.00
11 & 12	March 1, 1926	2000.00
13 & 14	March 1, 1927	2000.00
15 & 16	March 1, 1928	2000.00
17 & 18	March 1, 1929	2000.00
19 & 20	March 1, 1930	2000.00
21, 22 & 23	March 1, 1931	3000.00
24, 25 & 26	March 1, 1932	3000.00
27, 28 & 29	March 1, 1933	3000.00
30, 31 & 32	March 1, 1934	3000.00
33, 34 & 35	March 1, 1935	3000.00
36, 37 & 38	March 1, 1936	3000.00
39, 40 & 41	March 1, 1937	3000.00

42, 43 & 44	March 1, 1938	3000.00
45, 46 & 47	March 1, 1940	3000.00

Said warrants shall bear interest at the rate of six per cent (6%) per annum from date until paid, interest payable March 1st, 1920, and semi-annually thereafter on the 1st day of September and on the 1st day of March of each year; principal and interest on said warrants shall be payable at the Offices of the Brown-Crummer Investment Company, Wichita, Kansas.

Said warrants shall be signed by the Mayor, countersigned by the City Secretary, and registered by the City Treasurer, and the seal of the City shall be impressed upon each of them. The facsimile signatures of the Mayor and City Secretary may be lithographed upon the coupons attached to each of said warrants.

Said warrants shall be in substantially the following form:

No. ....

United States of America

State of Texas, County of Cooke.

City of Gainesville Street Improvement Warrant,

Series ....

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19.., at the Offices of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This Warrant Is one of a series of Fifty (50), inclusive, in the denomination of One Thousand ($1,000.00) Dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to The Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570, *et seq.*, of the Minutes of said City Council.

The Date of this warrant, in conformity with the ordinance above mentioned is November 20th, 1919.

And It Is Hereby Certified And Recited That all acts, conditions and things required to be done prec-

edent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof the City of Gainesville has caused the corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor, and countersigned by its City Secretary, and registered by the City Treasurer, as of the date last above written.

E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Countersigned:
S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

W. H. Garmany,
City Treasurer, City of Gainesville, Texas.

The form of interest coupon shall be substantially as follows:

No..... On The 1st Day Of March 1920 $30.00

the City Treasurer of the City of Gainesville, Texas, will pay to The Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of Thirty ($30.00) Dollars, the same being six months interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series .... No. .....

dated November 20th, 1919, to which this coupon is attached and is a part thereof.

E. N. Blackburn,
Mayor.

S. A. Bryan,
City Secretary.

Said warrants shall be executed and delivered to the said Southern Construction Company, Contractor, upon completion of their contract in accordance with the terms and provisions thereof, upon certified statement of account, or upon estimates of materials which have been furnished and labor which has been performed and accepted by said City prior to the date of approval of such estimates, such delivery to be made only after inspection of materials furnished and labor performed under said contract, and acceptance of said materials and work by the City Council.

Be It Further Ordained By the City Council that, to pay the interest and create a sinking fund sufficient to retire said warrants at their maturity, a tax of and at the rate of eight (8c) cents on the one hundred dollars' valuation of taxable property in said City of Gainesville, out of the tax of $1.50 on the one hundred dollars' appraised valuation of property in said City levied annually for general purposes and for the purpose of paying interest and providing the sinking fund on the bonded indebtedness and for the maintenance of public schools of said City, as provided in Sec. 1, Art. 3, of the Special Charter of the City of Gainesville, Texas, enacted by the 31st Legislature of Texas,

at its regular session, is hereby levied for the year 1919; that during the year 1920, and each year hereafter while any of said warrants are outstanding and unpaid, and at the time other City taxes are levied in each of said year, there shall be computed and ascertained what rate of tax, based upon the latest approval tax rolls of said City will be necessary, requisite and sufficient to fully make, raise and produce in each of said years, the amount of principal necessary to be raised for that year plus the interest maturing in said year upon the amount of this series of warrants maturing in said year, and for each of said years there is hereby ordered to be levied, assessed and collected, in due time, form and manner a tax at such rate as shall be found necessary as aforesaid, and all of the proceeds from such taxes shall be placed in a separate special fund for this series of warrants, known and designated as "Special Street Improvement Warrant Fund," and the City Treasurer shall not honor any draft upon said fund or pay out any of the same, except in the payment of interest on said warrants or for retiring the same.

The fact that the streets of the City are in a deplorable condition the present severe weather making them almost impassable creates a public emergency and an imperative public necessity that the rule requiring

ordinances to be read at three several meetings be suspended and that this ordinance take effect from and after its passage and it is so ordained.

Passed this the 16th day of December, 1919.

Approved this the 16th day of December, 1919.

E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:

S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

The warrants issued by the City of Gainesville, and purchased by Brown-Crummer Investment Company, were all in the form set forth in the foregoing resolution, and each contained the recitations appearing in said form.

A certified copy of said resolution of December 16, 1919, was attached to the first draft of H. W. Head upon Brown-Crummer Investment Company, dated April 27, 1920, for two thousand eight hundred fifty dollars ($2,-850.00), at the time said draft was presented to Brown-Crummer Investment Company for payment at Wichita, Kansas, and at the time same was paid. Said draft last mentioned covered warrants Numbers One (1) to Three (3) inclusive, and at the time same was paid by Brown-Crummer Investment Company, there was also attached to said draft certified copy of a resolution of the Gainesville City Council, dated April 6, 1920, in terms and language as follows:

"A Resolution.

Auditing and allowing estimate of the Southern Construction Company, for materials furnished and work performed in the construction of street improvements in and for the City of Gainesville, Texas.

City Hall, City of Gainesville, Texas.
April 6th, 1920.

The city council of the City of Gainesville, Texas, met in regular session, in the city hall, in said city, on this, the 6th day of April, 1920, at which meeting the mayor, aldermen, and city secretary were present, when the following proceedings, among others, were had, to-wit:

The mayor offered for consideration and passage a resolution providing for the allowance of estimate or claim of The Southern Construction Company, contractor, for materials furnished and work performed in the construction of certain street improvements in and for the City of Gainesville under its contract with the said Southern Construction Company, of date November 20, 1919.

Moved by Alderman Buckingham, seconded by Alderman Bramble, that the resolution be adopted.

Ayes: Aldermen Thomas, Beck, Bramble, Howell, Lewis, Puckett, Kendall and Buckingham.

Nays: None.

The resolution follows:

Whereas, on the 20th day of November, 1919, the City of Gainesville entered into a contract with the

Southern Construction Company, contractor, for the construction of certain street improvements in and for said city; and,

Whereas, the said Southern Construction Company has furnished materials and performed labor in performance of said contract and in accordance with the plans and specifications attached to said contract and made a part thereof, and for said materials and work the said Southern Construction Company has presented to this council their first estimate and claim covering the cost thereof to the city, which claim and estimate is in words and figures as follows, to-wit:

Estimate No. 1.

To the City Council of the City of Gainesville, Texas:

Gentlemen:

I present to you below Estimate No. 1, being claim for materials furnished and work performed under contract with the City of Gainesville, Texas, of date November 20, 1919, for partial cost of construction of street improvements provided for in said contract, to-wit:

For Gravel Base, Gutters and Excavation between Haight and Gorham Streets on Dixon Street.	$3,300.00
Less Ten Per Cent retained.	300.00
	3,000.00

Respectfully submitted,

Southern Construction Co.
by Lester Levy,
Contractor.

And, whereas, the materials so furnished and the work performed and covered by said claim has been by this council inspected and accepted by the city to be in accordance with the contract, and the plans and specifications adopted by this council, and determined by this council to be well worth the price agreed to be paid therefor as reflected in said claim and statement of account; and,

Whereas, said claim has been duly audited and found to be correct, and has been approved.

Therefore, be it resolved by the city council of the City of Gainesville, Texas, that the claim of the said Southern Construction Company, covering materials furnished and labor performed in the construction of said street improvements aggregating the sum of $3,000.00 be, and the same is hereby allowed.

That in accordance with the terms and provisions of said contract, and the claim of the said Southern Construction Company presented to this council, there shall be delivered to the said Southern Construction Company, City of Gainesville Street Improvement Warrants, Series A-1, to the amount of $3,000.00, being warrants numbers one (1) to three (3) inclusive, in the denomination of one thousand ($1,000.00) dollars each, dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, authorized to be issued by ordinance duly passed by the city council of said city on the 16th day of December, 1919, and recorded in Book 6, at pages 583, *et seq.*, of the minutes of this council, evidencing the indebtedness due by said city to the said

Southern Construction Company, their assigns or bearer.

That the City of Gainesville has received full value and consideration for the warrants herein authorized to be delivered.

Passed this the 6th day of April, 1920.

Approved this the 7th day of April, 1920.

(Seal) (Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:

S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

The State of Texas, County of Cooke.

I, S. A. Bryan, City Secretary of the City of Gainesville, Texas, hereby certify that the above and foregoing is a true and correct copy of a resolution passed by the city council of the City of Gainesville, Texas, on the 6th day of April, 1920, said resolution appearing of record in Book 7, at pages 38, *et seq.*, of the minutes of said city commission.

Witness my hand and the seal of said city this the 7th day of April, 1920.

(Signed) S. A. Bryan,
City Secretary, City of
(Seal) Gainesville, Texas."

Also attached to said draft at said time was an affidavit and certificate signed by the mayor and aldermen of the City of Gainesville, in terms and language as follows:

"*The State of Texas, County of Cooke.*

Before me, the undersigned authority, on this day personally appeared E. N. Blackburn, mayor, Aldermen Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Kendall, Puckett and S. A. Bryan, city secretary, who having by me first duly sworn, each on his oath, does state that the statements contained in the resolution passed by the city council on the 6th day of April, 1920, approving estimate presented by the Southern Construction Company, contractor, are true and correct; that the materials so furnished and the work performed and covered by said estimate or claim has been by said council inspected and accepted and found to be in accordance with said contract and plans and specifications, and determined by said council to be well worth the price agreed to be paid therefor, as reflected in said statement of account or estimate, and that the City of Gainesville has received full value for the money represented by said warrants.

Executed at Gainesville, Texas, this the 7th day of April, 1920.

(Signed) E. N. Blackburn,
Mayor.

J. W. Puckett,
Alderman.

.....,
Alderman.

.....,
Alderman.

.....,
Alderman.

.....,
Alderman.

C. M. Buckingham,
Alderman,

W. B. Nowell,
Alderman,

Geo. A. Beck,
Alderman,

Lee Lewis,
Alderman,

J. A. Thomas,
Alderman.

S. A. Bryan,
City Secretary.

Sworn to and subscribed before me, this the 24th day of April, 1920.

(Signed) W. Walker,
(Seal) Notary Public, Cooke County, Texas."

Also attached to said draft at said time was a certificate of W. M. Harris, in terms and language as follows:

"April Twenty Eighth
Nineteen Twenty.

I hereby certify that I have examined a certified copy of the record of the proceedings of the City Council of the City of Gainesville, Texas, passed preliminary to the issue by said city of its Street Improvement Warrants, Series A 1, to the amount of three thousand ($3,000.00) dollars, being warrants numbered one (1) to three (3) inclusive, in the denomination of one thousand ($1,000.00) dollars each, due serially 1921 to 1922, inclusive, of an issue of fifty (50) warrants in the denomination of one thousand ($1,000.00) dollars each, aggregating fifty thousand ($50,000.00) dollars, dated November 20th, 1919, and bearing interest at the rate of six per centum (6%) per annum; and in my opinion, such proceedings show lawful authority for the issue of said warrants numbered one (1) to three (3) inclusive, under the laws of the State of Texas and the city charter of the City of Gainesville, now in force.

I further certify that I have examined warrants numbered one (1) to three (3) inclusive, and find the same to be properly executed and in due form of law; and in my opinion the said issue to the amount of three thousand ($3,000.00) dollars aforesaid, is valid and legally binding upon the said City of Gainesville, and

that all the taxable property in said city is subject to the levy of a tax to pay the same.

Respectfully submitted,

(Signed) W. M. Harris."

The draft of H. W. Head for nine thousand five hundred dollars ($9,500.00), on Brown-Crummer Investment Company, dated September 22, 1920, which was paid by Brown-Crummer Investment Company, covered warrants numbers forty-one (41) to fifty (50) inclusive, and when paid by Brown-Crummer Investment Company at Wichita, Kansas, was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and except that the said papers and documents accompanying the draft of September 22, 1920, related to warrants numbers forty-one (41) to fifty (50) inclusive, and the amount of the estimate set forth in the resolution was ten thousand dollars ($10,000.00).

The draft of H. W. Head for sixteen thousand one hundred fifty dollars ($16,150.00), on Brown-Crummer Investment Company, dated October 5, 1920, which was paid by Brown-Crummer Investment Company, covered warrants numbers twenty-four (24) to forty (40)

inclusive, and when paid by Brown-Crummer Investment Company at Wichita, Kansas, was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and except that the said papers and documents accompanying the draft of October 5, 1920, related to warrants numbers twenty-four (24) to forty (40) inclusive, and the amount of the estimate set forth in the resolution was seventeen thousand dollars ($17,000.00).

The draft of H. W. Head for nine thousand five hundred dollars ($9,500.00), on Brown-Crummer Investment Company, dated November 5, 1920, which was paid by Brown-Crummer Investment Company, covered warrants numbers fourteen (14) to twenty-three (23) inclusive, and when paid by Brown-Crummer Investment Company at Wichita, Kansas, was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and

except that the said papers and documents accompanying the draft of November 5, 1920, related to warrants numbers fourteen (14) to twenty-three (23) inclusive, and the amount of the estimate set forth in the resolution was ten thousand dollars ($10,000.00).

The draft of H. W. Head for nine thousand five hundred dollars ($9,500.00), drawn on Brown-Crummer Investment Company, which was paid by Brown-Crummer Investment Company's check of date January 1, 1921, being said company's check No. 11214, for nine thousand five hundred dollars ($9,500.00), was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and except that the said papers and documents accompanying the draft of January 1, 1921, related to warrants numbers four (4) to thirteen (13) inclusive, and the amount of the estimate set forth in the resolution was ten thousand dollars ($10,000.00).

Accompanying and attached to each of said drafts at the time same was paid by Brown-Crummer Investment Company at Wichita, Kansas, were the warrants, with coupons attached, for which said respective drafts were drawn, and said original warrants with coupons attached, were among the papers attached to said

respective drafts at the time same were respectively paid.

Each of the ordinances and resolutions above referred to were regularly passed by the City Council of the City of Gainesville, on the respective dates above set forth.

At the time of paying for the warrants accompanying each of said respective drafts, and in each of said cases, the witness, R. E. Crummer, testified that he examined said warrants and papers before actually paying the draft, and believed the recitations therein contained to be true, and relied upon them. The warrants and coupons now owned by Brown-Crummer Investment Company, are as follows:

"EXHIBIT A."

Warrant No. 7, due March 1, 1924,	$1,000.00
Warrant No. 8, due March 1, 1924,	1,000.00
Coupon No. 9, detached from warrants Nos. 7 to 50, 44 at $30.00 each, due March 1, 1924.	1,320.00
Coupon No. 10, detached from warrants Nos. 9 to 50, 42 at $30.00 each, due September 1, 1924.	1,260.00
Coupon No. 11, detached from warrants Nos. 9 to 50, 42 at $30.00 each, due March 1, 1925.	1,260.00
Warrant No. 9, due March 1, 1925,	1,000.00
Warrant No. 10, due March 1, 1925,	1,000.00
Warrants 11 and 12, due March 1, 1925,	2,000.00
Coupon No. 12, detached from warrants Nos. 11 to 50, 40 at $30.00 each, due September 1, 1925	1,200.00

Coupon No. 13, detached from warrants Nos. 11 to 50, 40 at $30.00 each, due March 1, 1926. . . . . 1,200.00"

On September 27, 1920, Brown-Crummer Investment Company, through R. E. Crummer, its vice president, wrote to Harris & Graham, attorneys at Dallas, Texas, as follows:

"September 27, 1920.

Harris & Graham, Attorneys,
Dallas, Texas.

Gentlemen:

"Acknowledging receipt of your favor of the 23rd inst., we are pleased to note the shipment of the $10,000.00 City of Gainesville, Texas, Street Improvement Warrants, which we assume will be presented to us for payment through the American State Bank of this City at an early date, and payment therefor will be made promptly in accordance with the terms of our contract of purchase.

"We believe our Mr. Moore suggested to either you or Mr. Blaine that if it was practical to arrange for the delivery of this entire issue to the American State Bank of this City at one time upon the understanding that the various installments would be approved and released to us only as the estimates were allowed, that it would be of quite an assistance to us in securing and holding our commitments on this issue, the delivery of which has already been delayed so long that some of our prospective purchasers have

practically dismissed the subject from their minds. We can assure you that any assistance you may be able to render us to accomplish this end will be greatly appreciated.

"We wrote you a few days ago regarding any authority that may exist to permit Texas Counties to vote a refunding bond issue to retire outstanding warrants issued for Court House purposes. We presume that any authority that might permit this procedure would also apply to other characters of indebtedness.

"We have particularly in mind at this time the Archer County Texas Road & Bridge Warrants recently issued to the Texas Bridge Company, and would be particularly interested in knowing whether or not any proceedings can be directed whereby this county will be able to vote bonds for the purpose of refunding this indebtedness.

"According to your request, we are handing you herewith check for $30.00 covering your services to date in connection with the Gainesville Warrants.

"With best regards, beg to remain,

Yours very truly,

.....

REC/P Vice-President."

W. M. Harris heretofore mentioned was a member of the firm of Harris & Graham.

On October 1, 1920, Harrison & Graham, through W. M. Harris, wrote S. A. Bryan, City Secretary of the City of Gainesville, as follows:

"October 1st, 1920.

Mr. S. A. Bryan, City Secretary,
Gainesville, Texas.

Dear Sir:

"We have an inquiry from the Brown-Crummer Company of Wichita, Kansas, who are the purchasers of the warrants of your City, suggesting that an arrangement be made with your City for the delivery of all of the remaining warrants, to the American State Bank of Wichita, upon the understanding that the various installments will be approved and released to them as the estimates of the Contractor are allowed, stating that such an arrangement would be quite an assistance to them in securing and holding their commitments on this issue of warrants.

"It occurs to the writer that your City can well afford to do this for the reason that the purchasers have sustained a loss on the purchase of this series of warrants, and that the City can afford to assist them to this extent, in order to enable them to hold commitments already made.

"Of course, this would necessitate the execution of all of these warrants by the Mayor, yourself and the City Treasurer and forwarding them to the American State Bank of Wichita, Kansas, with instructions to deliver them in installments as authorized by resolution of the City Council of your city. If such an arrangement is satisfactory, please advise me and at the same time have the warrants properly signed by

the City officers and sealed with the City seal and forward same as above directed.

Yours very truly,

(Signed) Harris & Graham,
WMH/AMR By W. M. H."

On October 12, 1920, Brown-Crummer Investment Company, through R. E. Crummer, its vice president, wrote to the City Treasurer of the City of Gainesville, as follows:

"October 12, 1920.

City Treasurer,
Gainesville, Texas.

Gentlemen:

"We have today had presented to us $17,000.00 City of Gainesville Texas Street Improvement 6% Warrants, being the third installment delivered to the Southern Construction Company.

"We note, however, coupons aggregating $793.39 have been detached, which together with the 8% additional underwriting, makes a total of $1643.39 for which amount you will kindly remit us your check and promptly upon receipt of same, the draft of the Southern Construction Company will be honored.

"It is our understanding that arrangements would be made with you whereby the entire issue of warrants could be executed and delivered to our bank to be released to us at such times and in such amounts as the estimates are hereafter allowed. On account of the long delay in the closing of this transaction, it

would be very helpful to us in the sale of these securities to have this arrangement carried out if possible.

"Kindly let us hear from you by early mail, regarding the above, and greatly oblige,

Yours very truly,

(Signed)

.....,

REG/P Vice-President."

On October 30, 1920, Brown-Crummer Investment Company, through R. E. Crummer, its Vice-President, wrote to the Merchants & Planters National Bank of Sherman, Texas, attention H. W. Head, as follows:

"October 30, 1920.

Merchants & Planters National Bank,
Sherman, Texas.

Attention H. W. Head.

Gentlemen:

"We have your favor of the 27th inst. advising shipment of the $20,000.00 City of Gainesville Texas Improvement Warrants to the American State Bank of this City, which shall be taken up according to the terms of our contract as and when the various installments are due the contractor which you will appreciate must be evidenced by proper legal proceedings.

"We assume your letter of instructions to the American State Bank, in which it is stated that $10,000.00 are to be taken up not later than November 5th, and the remaining $10,000.00 not later than November 25th, is contingent upon the contractor

having received estimates within the times stated and are supplying us with this evidence.

"Any drafts drawn against us should be accompanied with complete legal papers which the Southern Construction Company have heretofore furnished us, covering the various installments, including final approving opinion of Judge Harris.

Yours very truly,

....,
Vice-President."

REC/P

The witness, R. E. Crummer, testified that pursuant to the letters above mentioned, the warrants were escrowed in the bank at Sherman, and subsequently escrowed in the bank at Wichita, Kansas, pursuant to the times stated in said letters.

Referring to that portion of the foregoing bill of exception, wherein it is recited that the witness, R. E. Crummer, testified: "Relying upon our attorneys advise, and these papers, I assumed that the city did have authority to issue the warrants without the engineer having made an estimate and certifying to it."

The following is substituted in lieu of said quotation: The following question was asked of said witness, and the following answer made by him:

"Q. Didn't you know the city had no authority to issue a warrant unless the engineer had made an estimate and certified to it?

A. Relying upon our attorneys advice, and these papers, I assumed they did have the authority."

In order that all the matters aforesaid may be made of record, I, W. L. Estes, District Judge, before whom said cause was tried, do hereby at the instance and request of the defendant Brown Crummer Co., sign and seal the foregoing additions and qualifications to the attached bill of exception, on this, the 28 day of June, 1926, the same as if said additions and qualifications were fully written into said bill of exception, and the same are here now made a part of said bill of exception.

W. L. Estes,
Judge of the United States District Court, for the Eastern District of Texas.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Bill of Exception. Filed June 28, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

Assignments of Error.

In the District Court of the United States for the Eastern District of Texas, sitting at Sherman in said District.

No. 241 *at Law.*

City of Gainesville,

vs.

Southern Construction Co., et al.

Now comes the City of Gainesville, plaintiff in error in the above numbered and entitled cause and

in connection with its petition for writ of error assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment rendered herein as appears of record.

1.

The court erred in refusing to give the first instruction requested by the plaintiff as follows:

"The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the consent of the qualified voters of the city of Gainesville granted at an election held for that purpose."

2.

The court erred in refusing to give the second instruction requested by the plaintiff as follows:

"The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute."

3.

The court erred in refusing to give the third instruction requested by the plaintiff as follows:

"Under Sec. 28, Art. 2 of the Charter of the City of Gainesville contracts are required to be let to the

lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects after the bids were received, without being re-opened to competitive bidding as changed, is void."

4.

The court erred in refusing to give the fourth instruction requested by the plaintiff as follows:

"The warrants issued by the City of Gainesville to the Southern Construction Company are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder."

5.

The court erred in refusing to give the fifth instruction requested by the plaintiff as follows:

"Under the charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void."

6.

The court erred in refusing to give the sixth instruction requested by the plaintiff as follows:

"The instructions to bidders and the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void."

7.

The court erred in refusing to give the seventh instruction requested by the plaintiff as follows:

"The unquestioned proof shows that the City of Gainesville received no consideration for $15263.73 of the series of $50000.00 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectable."

8.

The court erred in refusing to give the eighth instruction requested by the plaintiff as follows:

"In the acquisition of warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired such bonds, if at all, subject to all

the defenses the City of Gainesville had against them."

9.

The court erred in refusing to give the ninth instruction requested by the plaintiff as follows:

"If J. E. Blaine was the agent of Brown-Crummer Company in the purchase of the warrants in question and during said agency and before Brown-Crummer Company received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same."

10.

The court erred in refusing to give the tenth instruction requested by the plaintiff as follows:

"If the evidence shows that J. E. Blaine was the agent of Brown-Crummer Company, you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions,

then you are instructed that this was sufficient to constitute him an agent."

11.

The court erred in refusing to give the eleventh instruction requested by the plaintiff as follows:

"It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case, by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company."

12.

The court erred in refusing to give the twelfth instruction requested by the plaintiff as follows:

"The contract for the paving and the ordinances under which it was made prescribed that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of eight per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply with the charter in these respects renders the contract and all proceedings thereunder void."

13.

The court erred in refusing to give the following instruction requested by the plaintiff:

The contract between the City of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

14.

R. E. Crummer, being an interested party, the jury were the sole judges of his credibility and did not have to accept his evidence as true and the court therefore erred in instructing a verdict in favor of the Brown-Crummer Investment Company based solely upon the testimony of said Crummer.

15.

The warrants in question not being negotiable instruments, the court erred in assuming that the Brown-Crummer Investment Co. was a *bona fide* holder entitled to the protection accorded to *bona fide* holders of negotiable paper, and therefore erred in instructing a verdict in favor of said company.

16.

W. M. Harris, being the agent of the Brown Crummer Investment Co. to furnish the proceedings in reference to the issuance of the warrants, and to see that everything was in proper shape, notice to him was the same as notice to the Brown-Crummer Investment Co. and the court therefore erred in instructing a verdict in favor of said company.

17.

J. E. Blaine being unquestionably the agent of the Brown-Crummer Investment Co. in the purchase of the warrants in question and there being abundant evidence tending to show that said Blaine knew that the warrants were issued before the acceptance or performance of the work, and that the recitals in the resolution for their issuance were false, the court erred in instructing a verdict in favor of the Brown-Crummer Investment Company.

18.

The unquestioned proof showing that the City of Gainesville lacked something over $15000.00 of receiving the paving that should have been constructed to entitle the Southern Surety Co. to the $47000.00 of warrants and there being no proof showing or tending to show that H. W. Head paid out upon orders approved by the Mayor of Gainesville sums of money aggregating $47000.00 the court erred in instructing a verdict in favor of the defendant Head and the Southern Surety Co.

19.

There being no proof that H. W. Head paid out any sums of money upon orders approved by the Mayor of Gainesville, the court erred in instructing a verdict in favor of his executor.

20.

The warrants sued on being the last issued, the plaintiff received no consideration therefor or the consideration has wholly failed, therefore the court

erred in directing a verdict against the plaintiff on said warrants.

21.

The court in directing a verdict in favor of the Brown-Crummer Investment Co. deprived the plaintiff of its right of trial by jury guaranteed by the seventh amendment to the Constitution of the United States.

Respectfully submitted,

CECIL MURPHY,
W. O. DAVIS,
Attorneys for Plaintiff, the City of Gainesville.

Endorsed:

No. 241 Law. The City of Gainesville vs. Southern Construction Co. et al. Assignments of Error. Filed June 28th, 1926. F. A. King, Clerk, U. S. District Court. By.....deputy.

Petition for Writ of Error and Order Thereon Fixing Amount of Bond.

In the District Court of the United States for the Eastern District of Texas, sitting at Sherman.

No. 241 at Law.

City of Gainesville,

vs.

Southern Construction Co., et al.

To the Hon. W. Lee Estes, Judge of the District Court aforesaid.

Now comes the City of Gainesville, a Texas municipal corporation by attorney and respectfully shows

that on the 20th day of May, A. D. 1926, the court directed a verdict against your petitioner, and in favor of Brown-Crummer Investment Co., Southern Surety Co and H. O. Head, executor, and upon said verdict a final judgment was entered on the 20th day of May, A. D. 1926, against your petitioner.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit under the laws of the United States in such cases made and provided

Wherefore, premises considered, your petitioner prays that a writ of error do issue in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at Fort Worth in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

CECIL MURPHY,
W. O. DAVIS,
Attorneys for Petitioner in Error.

At Texarkana, June 28, 1926. Petition granted a writ of error allowed supersedeas bond fixed at thirty thousand dollars.

W. L. Estes, *Judge.*

Endorsed:

No. 241. The City of Gainesville vs. Southern Construction Co. et al. Petition for Writ of Error. Filed June 28th, 1926. F. A. King, Clerk U. S. District Court. By ..... deputy.

Writ of Error Bond.

Know all men by these presents:

That we City of Gainesville, Texas, a municipal corporation as principal, and H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson, and A. M. Bell, as sureties, are held and firmly unto Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor of H. W. Head in the full and just sum of thirty thousand ($30000.00) dollars, to be paid to the said Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand nine hundred and twenty-six.

Whereas, lately at a session of the United States District Court for the Eastern District of Texas, at Sherman, in a suit No. 241, pending in said court,

between the City of Gainesville and Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor defendants, a judgment was rendered against the said City of Gainesville and the said City of Gainesville having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden at Fort Worth, Texas, in said circuit, in not exceeding thirty days from the 21st day of June, 1926.

Now, the condition of the above obligation is such, that if the said City of Gainesville shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

City of Gainesville,
By J. Z. Keel, Mayor
H. F. Smith (Seal)
G. W. Brown (Seal)
J. B. Tanner (Seal)
Ed Nelson
A. M. Bell.

Sealed and delivered in presence of:

W. O. Davis.

Approved 6/28/26
W. L. Estes,
United States District Judge.

The State of Texas, County of Cooke.

I, Tom J. Midkiff, Clerk of the District Court for Cooke County, Texas, do certify that I am acquainted with H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson and A. M. Bell, whose genuine signatures appear to the attached bond and that each of said sureties is solvent and responsible and that said sureties own unencumbered property subject to execution much exceeding the amount of said bond.

Given under my hand and seal of office, this the 21st day of June, 1926.

(Seal) Tom J. Midkiff,
Clerk of the District Court for
Cooke County, Texas.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co. et al. Bond. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ..... deputy.

Writ of Error.

United States of America.

Fifth Judicial Circuit.

The President of the United States:

To the Honorable, the Judge of the District Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between City of

Gainesville, a Texas municipal corporation plaintiff in error, and Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor defendants in error a manifest error hath happened, to the great damage of the said City of Gainesville plaintiff in error as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the said United States Circuit Court of Appeals for the Fifth Circuit, togetner with this writ, so that you have the same at Forth Worth, Texas, in said circuit, not exceeding thirty days from the.....day of June 1926, being the date of issuance of the citation herein, in the United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, this 28th day of June in the year of our Lord one thousand nine hundred and twenty-six.

F. A. King,
Clerk of the District Court, of the United States for the Eastern District of Texas.
By . . ..Deputy.

Approved by
W. L. Estes, *Judge.*

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error this 28th day of June, 1926.

F. A. King, Clerk.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Writ of Error. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ..... Deputy.

Citation in Error.

United States of America.

Fifth Judicial Circuit, ss.

The President of the United States,

To Brown-Crummer Investment Co., a corporation, Southern Surety Co., a corporation, and H. O. Head, executor, and Elex F. Wiseberg, F. C. Dillard and John T. Sugg, their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of Fort Worth, in the State of Texas, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Texas, wherein the City of Gainesville, a Texas municipal corporation, is plaintiff, and Brown-Crummer Investment Co., Southern Surety Co. and H. O. Head, executor are defendants, to show cause, if any there be, why the judgment rendered

against said the City of Gainesville as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, this 28th day of June A. D. 1926, and of the independence of the United States the one hundred and fiftieth year.

W. L. ESTES,
United States District Judge.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Citation. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ....., Deputy.

Praecipe for Transcript.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

***No.* 241.**

City of Gainesville,

vs.

Southern Construction Co., et al.

Mr. F. A. King,
Clerk,

Dear Sir:

Please prepare the record in this case for the Circuit Court of Appeals. You know better than I do the order in which they should be placed, but the following papers should be included in the record:

1. Plaintiff's third amended original petition, filed April 13, 1926.

2. The amended answer of defendant Head, filed May 17, 1926.

3. The first amended answer of Brown-Crummer Investment Company, filed May 17, 1926.

4. The second amended original answer of the Southern Surety Co., filed May 17, 1926.

5. Plaintiff's first amended supplemental petition, filed May 17, 1926.

5½. Defendant Head's supplemental answer, filed May 17, 1926.

6. The agreement and stipulation of the parties, filed June 28, 1926.

7. The verdict of the jury returned May 20, 1926.

8. The judgment of the court rendered May 20, 1926.

9. The bill of exception and addenda thereto, filed June 28, 1926.

10. The petition for writ of error, filed June 28, 1926; and the order endorsed thereon allowing the same.

11. The writ of error.

12. The writ of error bond.

13. The citation in error.

14. The assignment of error.

W. O. DAVIS,
Attorney for Plaintiff.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co. et al. Praecipe for Transcript. Filed June 28, 1926. F. A. King, Clerk by J. R. Blades, Deputy.

Clerk's Certificate.

I, F. A. King, clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit and district aforesaid, do hereby certify that the foregoing is a full, true and correct transcript of record, bill of exceptions, assignments of error, and all the proceedings in cause No. 241, at law, wherein The City of Gainesville is plaintiff, and the Southern Construction Company, et al., are defendants, as fully as the same remains on file and of record in my office at Sherman, Texas, and that the same constitutes the return to the annexed writ of error and citation in error.

Witness my hand officially, and the seal of the court, at Sherman, Texas, this the 8th day of July, A. D. 1926.

F. A. King, Clerk,
By J. R. Blades, Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY et als.

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 9th, 1926

On this day this cause was called, and, after argument by W. O. Davis, Esq., for plaintiff in error, and Alex F. Weisberg, Esq., and F. C. Dillard, Esq., for defendants in error, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et als., Defendants in Error

Error to the District Court of the United States for the Eastern District of Texas

W. O. Davis (Cecil Murphy on the brief) for Plaintiff in Error.

Alex F. Weisberg (Elcock & Martin; Thompson, Knight, Baker and Harris on the brief), for Defendant in Error, Brown-Crummer Investment Company.

F. C. Dillard (Head, Dillard, Smith, Maxey & Head on the brief) for Defendant in Error, H. O. Head, executor.

John T. Suggs, for Defendant in Error, Southern Surety Co.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed July 6th, 1927

FOSTER, Circuit Judge:

The pleadings in this case are too voluminous to be briefly stated. The record is not as clear as it might be but the case shown without serious dispute may be summarized as follows.

In November, 1919, the City of Gainesville, Texas, hereafter referred to as the City, entered into a contract with the Southern Construction Company, hereafter called the Contractor, a partnership composed of Harry D. Levy and Lester Levy, for certain paving and other street improvements. The contract contemplated the City's paying for a portion of the general paving and entirely for the intersections, the City's share being estimated at $50,000.

After some preliminary and supplemental agreements this final result was arrived at. The Contractor agreed to accept warrants, at 5 per cent discount, in amounts of $1,000, maturing March 1, 1921 to March 1, 1940, with interest at 6 per cent, payable semi-annually and evidenced by coupons attached.

The Brown-Crummer Investment Company, hereafter called the buyer, agreed to purchase these warrants when issued and further agreed to print them and to furnish legal advice to the City and supervision of the necessary ordinances, for a further discount of 5 per cent. The warrants up to $47,000 were printed and delivered to H. W. Head, who was in some way interested in the contract, in escrow, and he agreed to indemnify the City on the contract up to $50,000, and furnished the Southern Surety Company, hereafter called the Surety Company, as guarantor for his undertaking.

From time to time as the work progressed the city council adopted ordinances purporting to approve estimates of the engineers covering the work completed, retaining 10 per cent and authorizing the issuance of warrants to

cover same. Head drew drafts on the buyer with the warrants and certified copies of the ordinances attached, and these drafts were paid. Six of the warrants have been paid by the City and the City also from time to time remitted the additional 5 per cent discount to the buyer. The warrants were in form as follows:

Number —, $1,000.00

"UNITED STATES OF AMERICA,
"State of Texas, County of Cook:

"City of Gainesville Street Improvement Warrant, Series A 1

"This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the first day of March, 1921, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the first day of March, 192- and semi-annually thereafter on September 1st and March 1st of each year and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto principal and interest payable at the place above named upon presentation and surrender of warrant or proper coupon.

"This Warrant is one of a series of Fifty (50) warrants, numbered consecutively from One (1) to Fifty (50) inclusive, in the denomination of One Thousand Dollars ($1,000.00) each aggregating the sum of Fifty Thousand Dollars ($50,000.00), issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and Laws of the State of Texas, and

pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 16th day of December, 1919, recorded in Book 6, at page 583, et seq. of the Minutes of said City Council.

"The date of this warrant, in conformity with the ordinance above mentioned, is November 20th, 1919.

"And It Is Hereby Certified and Recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

"In Witness Whereof, the City of Gainesville has caused this corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor and countersigned by its City Secretary, and registered by the City Treasurer as of the date last above written.

"E. N. Blackburn, Mayor City of Gainesville, Texas.

"Countersigned: S. A. Bryan, City Secretary, City of Gainesvile, Texas.

"Registered this the 27th day of April, 1920.

"R. R. Hullett, City Treasurer, City of Gainesville."

Before the paving was completed the work on two streets was stopped by an injunction secured by a taxpayer. Thereafter the contractor offered to do paving on other streets but nothing came of this offer. The warrants, however, had all been issued and had been paid for by the buyer. In October, 1921, suit was brought by the City in the District Court of Cook County, Texas, against the contractor, H. W. Head, and the Surety Company, to recover the difference between the warrants issued and the work done, alleged to be about $15,000. The City at that time apparently had no thought of contesting the validity of the warrants and did not include the buyer in the suit. A default judgment was rendered in favor of the City against the contractor for $4,090 and against the other two defendants for $15,000. On appeal this was affirmed as to the contractor and reversed as to Head and the Surety Company by the Court of Civil Appeals for the Sixth Supreme Judi-

cial District, 254 S. W. 223. The reversal was on the ground that the petition showed no cause of action against Head and the Surety Company. The validity of the warrants was not considered.

On the remanding of the case to the District Court the City filed an amended petition making the buyer a party defendant. The buyer removed the case against itself to the United States District Court for the Eastern District of Texas as a separable controversy and a motion to remand was denied. Thereafter, the City recast its pleadings and again made the Surety Company party defendant, and, as H. W. Head had died in the meantime, H. O. Head, his executor, was brought in. The contractor was omitted from the suit. In the petition in the Federal Court the City prayed for a judgment against the buyer declaring the warrants void and for an injunction restraining their sale or other disposal, and prayed for judgment against the other defendants in the sum of $15,264.71. The buyer set up a counterclaim in the answer and prayed for judgment against the City on the warrants and coupons then due and unpaid. Notwithstanding the prayer for equitable relief the case was tried to a jury and at the conclusion of the evidence the Court directed a verdict in favor of the buyer in the amount of $13,125, and rejected the claim of the City against H. O. Head, executor, and the Surety Company. There are numerous errors assigned but those running to the direction of the verdict are the only ones that need be considered.

The case presents an anomaly in pleading and practice, but applying the remedial provisions of section 269 J. C. as amended (40 Stat. 1157) we may consider it on this writ of error. The court was without jurisdiction as between the City and Head, executor, and the Surety Company, as the case had not been removed as to them and there could be no jurisdiction, as between the City and Head, both being citizens of Texas, in any event. But that could not affect the jurisdiction as to the buyer and in view of the result we may dismiss those two defendants from further consideration.

The City contends that the instruments in suit are in fact bonds and not warrants and are void because not issued in conformity with the City charter and the laws of Texas and

also relies upon certain irregularities in the awarding of the contract and the issuing of the warrants.

The charter of the City of Gainesville was granted by a special act of the Texas Legislature, approved March 17, 1909, which act contains the recital that it shall be considered a public law of Texas, and thereafter, within the same year, was adopted by a vote of the people. Under its general powers the City has full authority to contract; to grade, pave and otherwise improve its streets, and to levy annually for general purposes and for paying its bonded indebtedness ad valorem taxes on all real, personal and mixed property within the territorial limits of the City. The charter contains these specific provisions:

"The specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the state of Texas, or by the provisions of the Constitution of the State of Texas."

"The provisions of this act shall be liberally construed with a view to carry out the purposes of this charter and in case of doubtful construction, it shall be resolved in favor of the city."

Section 1, article 4 of the charter provides that the City shall have the authority by ordinances duly passed to borrow money for permanent improvements, including paving and re-paving of the streets, and may issue bonds for that purpose in amounts not exceeding $150,000 in any one year, subject to approval by the taxpayers at an election held for that purpose if the amount exceeds $2,500; requires that provision be made at the same time to assess and collect annually a sufficient sum to pay the interest on the bonds and to create a sinking fund of at least 2 per cent; that the bonds shall not pay more than 5 per cent interest and shall be invalid if sold for less than par and accrued interest.

The laws of Texas provide for submission to the taxpayers of a proposition for the issuance of bonds by a city;

that bonds can have no validity unless approved by the Attorney General; and that said bonds must be registered by the Comptroller. R. S. 701-709-710.

If the instruments in suit were to be classed as bonds there could be no doubt of their invalidity but they are not to be so considered. It was not contemplated that the warrants should be issued for the purpose of borrowing money. It was the intention of all parties that they should be issued in payment for work actually done in paving and otherwise improving the streets under the general powers of the City and the fact that they were payable in future years would not render them invalid. It is not shown that the City would not have sufficient funds for general purposes for the years in which the warrants fall due, nor that the taxes assessed would exceed the legal limit imposed upon the City. The distinction between bonds and warrants issued by Texas municipal corporations has been repeatedly recognized by the courts of that state. The provisions of the charter and the Texas law as to bonds do not effect the authority of the City to issue warrants to be paid out of current revenue in the future. Lasater vs. Lopez, 217 S. W. 373; City of Tyler vs. Jester & Co., 97 Texas 344; Bridges vs. City of Lampasas, 249 S. W. 1085.

As affecting the validity of the obligations as warrants the City contends that the paving contract and all the proceedings relating thereto are void because estimates of the cost, and plans and specifications for the proposed work, were not approved by the council before advertising for bids; that the contract as let was different from the bid and less burdensome; and that the contract provided that preference be given to citizens of Texas and Gainesville; and that in some instances estimates of the work completed were not in fact made before the ordinances approving them were adopted. Perhaps these irregularities might have been urged by a taxpayer or an unsuccessful bidder in a suit to enjoin the letting of the contract or to prevent the prosecution of the work, on showing fraud or damage to the City, but after the contract was let and the work completed it is doubtful that the City could urge them against the contractor. The City also contends that there was a failure of consideration. It seems to be agreed between the parties that the amount of work not done under the con-

tract amounted to about $15,000. It is difficult to reconcile this with the fact that when the contractor was sued in the state court the recovery was only about $4,000, but assuming that the deficiency in work done was approximately $15,000, still the City had ample security for that amount.

It is unnecessary however to consider the objections to the warrants above made. The City had the capacity to issue and sell the warrants. Recitals in warrants or other evidences of debt issued in payment of the obligations of a city are made for the purpose of inducing the purchase of the instruments and are binding upon the municipality in the absence of fraud or knowledge on the part of the purchaser of facts that show the invalidity of the warrants.

It is true that a Mr. Blaine represented the buyer initially in negotiating the purchase of the warrants and attended some of the meetings of the council and that Mr. Wm. M. Harris, a well known and reputable attorney of Dallas, also represented the buyer in preparing the ordinances for the adoption of the council and supervised to some extent the subsequent proceedings, but it is not shown that either of these men had any knowledge of any irregularities in the letting of the contract or in the doing of the work or the adoption by the council of estimates, and it is shown without contradiction by the testimony of Mr. Crummer, who represented the buyer in the final purchase of the warrants, that he had no knowledge of any of the irregularities now urged and relied entirely on the recitals in the warrants in buying them.

In this case the City is clearly estopped to urge the irregularities above mentioned and the partial failure of consideration, and it is immaterial that the warrants were sold at a discount. City of South Houston vs. Carman, 6 F. (2d) 358; Slayton & Company vs. Panola County, 283 Fed. 330; Scott County vs. Advance Rumley Thresher Co., 288 Fed. 739; Grimes County vs. W. L. Slayton & Co., 262 S. W. 209; Evansville vs. Dennett, 161 U. S. 434; City of Belton vs. Brown-Crummer Investment Co., 17 F. (2d) 70.

From the above the conclusion reached is that reversible error is not shown in the direction of the verdict in favor of Brown-Crummer Investment Company and to that extent the judgment is affirmed. The case is remanded with

instructions to dismiss the proceedings as between the City and Head, executor, and the Surety Company. And for such other proceedings as may be necessary, not inconsistent with this opinion.

Affirmed in part, reversed in part.

JUDGMENT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY, et als.

Extract from the Minutes of July 6th, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be and the same is hereby, affirmed to the extent of the direction of the verdict in favor of Brown-Crummer Investment Company, and that said cause be, and the same is hereby remanded to the said District Court with instructions to dismiss the proceedings as between the City of Gainesville and H. O. Head, executor, and the Southern Surety Company, and for such other proceedings as may be necessary, not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the plaintiff in error, City of Gainesville, a Texas Municipal Corporation, and the sureties on the writ of error bond herein, H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson and A. M. Bell, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

MOTION AND ORDER STAYING MANDATE—Filed July 15th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendant in Error

Application for Stay

To the judges of said Court:

The City of Gainesville, plaintiff in error, respectfully alleges that it will endeavor to have this cause removed to the Supreme Court of the United States by certiorari and will prepare the petition and other procedure as speedily as possible. The judgment bears interest at the rate of six per cent per annum and is secured by writ of error bonds in more than double the amount of the judgment and no possible injury can result from a stay. Wherefore plaintiff in error prays for an order staying the execution of the judgment for the period of three months from July 6, 1927.

(Signed) Cecil Murphy, W. O. Davis, Attorneys for Plaintiff in Error.

Order

Considering the foregoing petition, it is ordered that the mandate in this cause be stayed until September 1st, 1927, upon plaintiff in error giving bond in the sum of three thousand ($3,000.00) dollars to afford the plaintiff in error an opportunity to file in the Supreme Court of the United States a petition for a writ of certiorari, and that in the event that said petition be filed within the above time, then it is still further ordered that the mandate in this cause do not issue until the Supreme Court of the United States passed upon said petition for a writ of certiorari.

New Orleans, Louisiana. July 14th, 1927.

(Signed) Rufus E. Foster, U. S. Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

versus

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendants in Error

BOND ON CERTIORARI—Filed July 25th, 1927

Know all men by these presents:

That we, City of Gainesville, a Texas Municipal Corporation, as principal, and Roy T. Potter and J. W. Gladney, as sureties, are held and firmly bound unto Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor of H. W. Head in the full and just sum of three thousand ($3,000.00) dollars to be paid unto the said Brown-Crummer Investment Co., and various others as stated above, their successors and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and firmly by these presents.

Sealed with our seals and dated this the — day — July, A. D. 1927.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in the above suit pending in the said United States Circuit Court of Appeals, wherein the City of Gainesvile, a Texas Municipal Corporation, was plaintiff in error, and the Brown-Crummer Investment Company, and others, were defendants in error, a decree was rendered against the said City of Gainesville, a Texas Municipal Corporation, and the said plaintiff in error has this the 15th day of July, A. D. 1927, obtained a stay of the mandate of the said United States Circuit Court of Appeals in the above entitled and numbered cause until the first day of September, A. D. 1927, to enable plaintiff in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals;

Now, therefore, the condition of this obligation is such that if the said City of Gainesville, a Texas Municipal Corporation, fails to make application for such writ on or before September 1st, 1927, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court, it shall answer for all damages and costs which the said Brown-Crummer Investment Co., and others, may sustain by reason of the stay, otherwise this obligation shall be null and void.

City of Gainesville, a Texas Municipal Corporation, by (Signed) Frank R. Stanford, Mayor. (Signed) J. W. Gladney, Roy T. Potter, Sureties.

Approved: (Signed) Rufus E. Foster, U. S. Circuit Judge.

THE STATE OF TEXAS,
County of Cooke:

I, Tom J. Midkiff, Clerk of the District Court for Cooke County Texas, do certify that I am well acquainted with Roy T. Potter and J. W. Gladney, the sureties on this bond. They are engaged in the banking business and are solvent and responsible. Each of them owns unencumbered property subject to execution of a value many times exceeding the said bond.

Given under my hand and seal of office, this the 18th day of July, 1927.

(Signed) Tom J. Midkiff, Clerk of the District Court for Cooke County, Texas. (Seal.)

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 286 to 302 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered

4861, wherein the City of Gainesville, a Texas Municipal Corporation, is plaintiff in error, and Brown-Crummer Investment Company et al., are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 285 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of July, A. D. 1927.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.